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71-1219

IN THE

Supreme Court of the United States

October Term, 1971.

No. .

SCENIC HUDSON PRESERVATION CONFERENCE, THE WILDERNESS SOCIETY, THE IZAAK WALTON LEAGUE OF AMERICA, NATIONAL AUDUBON SOCIETY AND NATIONAL PARKS AND CONSERVATION ASSOCIATION,

Petitioners,

v.

FEDERAL POWER COMMISSION AND CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., TOWN OF CORNWALL AND VILLAGE OF CORNWALL,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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INDEX.

	Page
Opinions Below	2
Jurisdiction	2
Questions Presented	3
Statutes Involved	4
Statement	7
1. The Issue	7
2. The Commission's Opinion	10
3. Proceedings in the Court Below	14
Reasons for Granting the Writ	16
1. The Commission's Opinion and Order Fails to Comply With Section 102(2)(C) of the National Environmental Policy Act	19
2. The Commission Failed to Discharge Its Planning Responsibilities Under Section 10(a) of the Federal Power Act	28
3. The Court Below Erred in Adopting a Narrowly Limited Reviewing Function	32
Conclusion	37
Appendix:	
1971 Opinion	A1
1965 Opinion	A62
Order Denying Petition for Review	A92
Order Denying Rehearing	A94
NEPA Cases	A96

TABLE OF CASES CITED.

Page

Calvert Cliffs' Coordinating Committee, Inc. v. Atomic Energy Commission, 449 F. 2d 1109 (C. A. D. C. 1971) 3, 9, 17, 19, 20, 21, 27, 28, 33, 36, 37

Citizens to Preserve Overton Park v. Volpe, 401 U. S. 402 (1971) 17, 35, 36

Environmental Defense Fund v. Corps of Engineers, 331 F. Supp. 925 (D. D. C. 1971) 18, 36

Gainesville Utilities Department v. Florida Power Corp., 402 U. S. 515 (1971) 33

Greene County Planning Board v. Federal Power Commission (Docket Nos. 71-1991, 71-1996) 28, 31, 33

Permian Basin Area Rate Cases, 390 U. S. 747 (1968) 32, 33

Scenic Hudson Preservation Conference v. Federal Power Commission, 346 F. 2d 608 (C. A. 8, 1965), cert. denied, 384 U. S. 941 (1966) 2, 7, 8, 9, 15, 16, 18, 22, 29, 31, 36

Udall v. Federal Power Commission, 387 U. S. 428 (1967) 31, 36

AUTHORITIES CITED.

Page

Federal Power Act:

Section 10 (16 U. S. C. § 803) 6

Section 10a 3, 9, 16, 17, 31, 32

Section 313(b) (16 U. S. C. § 825l(b)) 2, 32

Historic Preservation Act of 1966 (80 Stat. 915) 20

National Environmental Policy Act:

Section 101 4

Section 102 4

Section 102(2)(C) 3, 12, 19, 20, 21

United States Code, Section 552, Title 5 5

28 U. S. C. § 4254(1) 2

1968 FPC Report, p. 55 35

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Scenic Hudson Preservation Conference, The Wilderness Society, The Izaak Walton League of America, National Audubon Society and National Parks and Conservation Association[1] petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above case on October 22, 1971.

1. The City of New York and The Sierra Club and its Atlantic Chapter are separately represented and are filing separate petitions seeking review of the decision below.

OPINIONS BELOW.

The majority opinion of Judge Hays and Chief Judge Friendly and the dissenting opinion of Judge Oakes, in the Court of Appeals (App. 1-61) are reported at 453 F. 2d 463. The opinion and order of the Federal Power Commission are filed with this petition as a separate appendix referred to as "S. A." An earlier licensing order in the same matter had been set aside and the proceedings remanded to the Commission in *Scenic Hudson Preservation Conference v. Federal Power Commission*, [redacted] F. 2d 608 (C. A. 2, 1965), *cert. denied*, 384 U. S. 941 (1966), set forth in the Appendix 62-91, *infra*, and hereinafter referred to as *Scenic Hudson I*.

JURISDICTION.

The judgment of the Court of Appeals (App. 92-93) was entered on October 22, 1971. Timely applications for rehearing *en banc* were denied by an evenly divided court on November 26, 1971 (App. 94). The time within which an application for certiorari might be made was extended by Mr. Justice Marshall to and including March 25, 1972. This Court's jurisdiction is invoked under 28 U. S. C. § 1254(1) and the Federal Power Act, § 313(b), 16 U. S. C. § 825*l*(b).

QUESTIONS PRESENTED.

1. Whether the Power Commission satisfied the mandate of the National Environmental Policy Act by generalized and mechanical reference, in the course of a long opinion mainly concerned with power considerations, to the environmental categories specified for full and detailed response in Section 102(2)(C) of that Act.

2. Whether the Commission, by an opinion which avoided consideration of the paramount environmental values involved—the impact of a major industrial project on the whole course of planning for the Hudson Highlands and the irreversible damage to the unique beauty of Storm King Mountain—satisfied its comprehensive planning responsibilities under Section 10(a) of the Power Act, as enhanced by the National Environmental Policy Act.

3. Whether the court below fulfilled its reviewing function under the Federal Power Act and the National Environmental Policy Act by narrowly limiting the scope of its review to the question of substantial evidence and then accepting the Commission's evidentiary conclusions and its assurance that it had given the necessary consideration to the requirements of the National Environmental Policy Act—a position in sharp conflict with the decision of the Court of Appeals for the District of Columbia in *Calvert Cliffs' Coordinating Committee, Inc. v. Atomic Energy Commission*, 449 F. 2d 1109 (C. A. D. C. 1971).

STATUTES INVOLVED.

Section 101 of the National Environmental Policy Act, 42 U. S. C. § 4331, provides in pertinent part:

> "(b) In order to carry out the policy set forth in this chapter, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may—
>
> "(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;
>
> "(2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;
>
> "(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;
>
> "(4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;"

Section 102 of the National Environmental Policy Act, 42 U. S. C. § 4332, provides in pertinent part:

> "The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act, and (2) all agencies of the Federal Government shall—

"(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

"Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, United States Code, and shall accompany the proposal through the existing agency review processes;

"(D) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources; * * *"

Section 10 of the Federal Power Act, 16 U. S. C. § 803, provides in pertinent part:

> "All licenses issued under sections 792, 793, 795-818, and 820-823 of this title shall be upon the following conditions:
>
> "(a) That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of waterpower development, and for other beneficial public uses, including recreational purposes; and if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval."

STATEMENT.

1. The Issue.

On August 19, 1970, the Federal Power Commission granted to Consolidated Edison Company of New York, Inc., for the second time, a license to build a pumped storage power plant at Storm King Mountain in the Hudson Highlands. The Commission's first licensing order of March 9, 1965, had been set aside by the court below and the case remanded with instructions. *Scenic Hudson Preservation Conference v. Federal Power Commission I* (App. 62-91).

The project would

> "be located in an area of unique scenic beauty and major historical significance. The highlands and gorge of the Hudson offer one of the finest pieces of river scenery in the world. The great German traveller Baedeker called it 'finer than the Rhine.'" (*Scenic Hudson I* App. 66)

Storm King Mountain, the most majestic of the great hills in the Highlands, stands at the northern gateway to the gorge and, with Breakneck Ridge to the east, forms the portal to the ten mile stretch of the Highlands which lie below it.

The project would consist of three principal elements: a storage reservoir 1,000 feet above the Hudson and almost a mile across, to be enclosed by five large dams, the largest of which would be 2,250 feet long and 275 feet high; an underground powerhouse which, however, requires a tailrace for drawing in and discharging water, an open cut of 560 feet along the base of Storm King Mountain and a cut into the mountain of between 195 to 260 feet, together with concrete bridges and abutments approximately 700 feet long, a large entrance tunnel and approach roads for access to the plant;[2] and transmission lines running under the

2. The powerhouse chambers would be excavated within 140 feet of the Catskill Aqueduct, which carries 40% of New York City's fresh water supply.

Hudson and thence underground for 1.6 miles but then emerging and extending on overhead high-tension towers, requiring a swath at least 125 feet wide, for more than 9 miles through rolling and undeveloped lands.[3]

The project would not produce new power. During off-peak hours, Con Edison's baseload plants in New York City would be used to supply power to pump water up to the reservoir, whence it could be released in peak periods to help meet the higher demand. Since 1.4 kilowatts of pumping energy would return only 1 kilowatt of electricity from the plant, the overall effect would be to consume more power than would ultimately be generated.

As mentioned above, the Commission's 1965 order was set aside and the case remanded for further proceedings which, the court below ordered, "... must include as a basic concern the preservation of natural beauty and of national historic shrines ..." (App. 90). The Commission was also directed to take into account the "totality of a project's immediate and long-range effects, and not merely the engineering and navigation aspects," and to give full consideration to alternative power sources (App. 84).

The 1965 opinion of the court below crystallized the growing concern of the nation with the dangerous degradation of all aspects of our natural resources. Indeed, it can be said that the opinion set in motion the train of legislative, administrative and judicial actions by which the country now strives to meet and solve the environmental crisis.

It would be a tragic irony if the same controversy which gave rise to the opinion in *Scenic Hudson I* were to become the vehicle for nullifying the effectiveness of the

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3. The project also involves the construction of a 57 acre picnic and playground park as an adjunct to the powerhouse at the river level, using the rock gouged from the mountain as fill. The park is to be ceded to the Town of Cornwall for its exclusive use and control.

critical legislation enacted as a major step forward in preserving and protecting the environment. That is the issue presented in this case.

The opinion in *Scenic Hudson I* rested on Section 10(a) of the Federal Power Act and properly interpreted and enforced the comprehensive planning responsibilities of the Commission in the light of current needs. Now, the case is further governed by the National Environmental Policy Act, the most important of the measures which Congress has enacted to meet the environmental crisis. In NEPA, Congress established uniform policies and procedures to be followed by all agencies of the Federal Government. The basic duty of both administrative agencies and courts is to make sure that the "[illegible] promise of this legislation will become a reality [illegible]," that its "[illegible] important legislative purposes, heralded in the halls of Congress, are not lost or misdirected in the [illegible] halways of the federal bureaucracy." *Calvert Cliffs' Coordinating Committee, Inc. v. Atomic Energy Commission*, 449 F. 2d 1109, 1111 (C. A. D. C. 1971).

Thus, the grave danger is that the agency involved, here the Power Commission, will be unable or unwilling fully to adjust to the use of the new values and standard mandated by NEPA. Careful analysis of the lengthy opinion of the Commission reveals that every important decision was reached in terms of the Commission's traditional power considerations, with little or no significant weight being given to basic environmental concerns. The result reached by the Commission was permitted by the court below to stand only by virtue of the court's resort to a limited rule of review which failed entirely to recognize the enhanced duties cast upon reviewing courts by NEPA.

We will now summarize the principal points of decision in the Commission's opinion and the basis upon which the Commission's result was affirmed by the majority of the panel which heard the matter on review.

2. The Commission's Opinion.

The hearings on remand commenced on November 14, 1966 and were concluded on May 23, 1967. On August 6, 1968, the Hearing Examiner issued his initial decision recommending that Con Edison be granted a 50 year license. On November 19, 1968, the proceedings were reopened to permit the City of New York to intervene and introduce evidence on the danger to the Aqueduct. Evidence was also taken at this time on an alternative site in Palisades Interstate Park. On December 23, 1969, the Hearing Examiner issued a supplemental decision concluding that the project did not endanger the Aqueduct and that the alternative site was not a proper and preferable location.

On August 19, 1970, the Commission issued its opinion and order. As the Commission viewed its task, the issue was

> "* * * whether the project offers substantially more reliable electric service as well as cheaper electricity generated in a cleaner manner than any other feasible alternative and, if so, whether the project will create detrimental aesthetic and environmental conditions of such degree as to lead on balance to a judgment that the public convenience and necessity would be better served by denying the application herein." (Paragraph 44, S. A. 12).

Thus, the Commission put a final resolution of the power question first. Accordingly, the Commission discussed reliability, peaking power, alternatives such as gas turbines, nuclear-gas turbine combinations and all-nuclear facilities, alternative pumped storage sites and the use of purchased power, and concluded that the Storm King project was preferable to all other alternatives (Paragraphs 46-141, S. A. 13-39). Only after this power decision had been made did the Commission turn to a consideration of the environmental factors, designated "Aesthetic and Recreational Resources of the Region." In the words of

the Commission, a veritable "Who's Who" of conservation appeared to oppose the project on the ground that it would create an irrevocable degradation of the natural beauty of the region, a subject described by the Commission as an "* * * esoteric and subjective matter." (Paragraph 144, S. A. 41). The Commission's response to all of this testimony was the statement that the mountain, as it has swallowed the scars of the past "* * * will swallow the structures which will serve the needs of the people for electric power" (Paragraph 148, S. A. 43). The Commission went on to observe that "* * * most of the structures will literally be buried, and those that cannot be buried, while to be regretted, nevertheless will be made as unobtrusive as ingenuity can make them" (Paragraph 148, S. A. 43). The Commission then found that the project "* * * constitutes no real impairment of the environmental and scenic aspects of the Highlands and the natural beauty of the area will not be significantly degraded" (Paragraph 153, S. A. 43).

Having thus determined that the Storm King project was the best from Con Edison's point of view and having rejected or discounted testimony as to the damaging impact of the project on the Hudson Highlands region, the Commission turned, for the first time, to a consideration of its duties under that portion of Section 10(a) which requires that the project should be best adapted to "* * * other beneficial public use, including recreational purposes * * *." This language was defined by the court below, in its 1965 opinion, as encompassing "* * * the conservation of natural resources, the maintenance of natural beauty and the preservation of historic sites" (App. 69). In its opinion, the Commission took a narrower approach to the meaning of "recreational purposes", quoting with approval the finding of the Hearing Examiner that the 57 acre picnic and playground area would actually improve the region[4] and holding that, by reason of recreational facilities available in Palisades Interstate Park and Hudson Highland

4. The 57 acre park would be ceded to the Town of Cornwall.

State Park, the region was following " * * * the pattern of a recreational, as distinguished from a natural or wilderness area. * * *" (Paragraphs 181, 182, 184, S. A. 50, 51).

The Commission briefly referred to the procedural requirements of Section 102(2)(C) of NEPA, which establishes the environmental impact statement requirements. The Commission stated generally, after referring to its prior findings,[5] that " * * * full and careful consideration was given to all the concerns which the Act embodies." (Paragraph 216, S. A. 60). The Commission concluded (Paragraph 217, S. A. 61):

> " * * * Any short-term adverse impact on the natural environment is more than offset by the enhancement of long term productivity which will result from the project. The resources which will be committed to this project are the acreage it will necessarily encompass and the fuel resources which will be committed to pumping energy. But the electric energy resources which will be generated by the commitment of such resources will many times over 'foster and promote the general welfare' and 'fulfill the social, economic and other requirements of present and future generations.' Section 101(a)."

The Commission discussed the upper reservoir which would cover an area of approximately 240 acres, formed by 5 dams varying in height to 275 feet above ground (Para-

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5. The Commission again emphasized that the water-from-pick weighed "* * * overwhelmingly in favor of aesthetic and environmental improvement which the project brings to bear on the available resource * * *," and that it was a perfect example of what was intended by the reference in Section 101(b) to " * * * beneficial public use, including recreational purposes" (Paragraph 215, S. A. 60). The Commission also stated, at this point, that "* * * none of the most likely proposed alternatives, including an all-nuclear unit or the mixed nuclear and gas turbine combination, could be sited within 100 miles of New York City with any less physical impact on the environmental aspects of the affected area than the Cornwall project." (Paragraph 215, S. A. 60).

graphs 297-299, S. A. 81).[6] The dams are designed to permit a maximum water elevation of 1,210 feet in the event the project capability is increased from 2,000 megawatts to 3,000 megawatts. The Commission noted that reservoir construction would require the acquisition of 240 acres of Black Rock Forest and that the forest *presently consisted* of second growth timber, not rare plants or trees (Paragraph 303, S. A. 82). The Commission discussed various contentions, such as inundation of the scenic valley, the size of the reservoir, the appearance of the dams as the level of the reservoir rises and falls, but concluded that the reservoir was not "* * * incongruous with the present character of the area" and not "* * * out of character with the scrub growth, rock outcroppings, bare spots, and trees which are all part of the Highlands. * * *" (Paragraphs 307, 309, S. A. 83, 84.)

The Commission next discussed the possibility of the construction of the site at a point about one mile south of Storm King, on the north spur of Crows Nest Mountain, within the Palisades Park. Use of this site would require stripping off vegetation and trees for a distance of approximately 900 feet along the river and to a height of approximately 200 feet, above the tailrace. It would also involve the construction of a tunnel entrance 40 feet above the present railroad bed with an opening of some 30 feet (Paragraphs 319, 325, S. A. 86, 87). The Palisades Park Commission vigorously opposed this alternative site on both legal and ecological grounds (Paragraphs 325, 327-328, S. A. 87, 88). The Hearing Examiner had also rejected this site. However, the Commission approved this alternative site in the event that Con Edison was precluded on court review from proceeding with the construction at Storm King (Paragraph 335, S. A. 89-90). The Commission found that the surface area involved was very steep and not "* * * presently developed as a park * * *" (Para-

6. The Commission did not discuss this important environmental factor before reaching its conclusion that degradation of the environment would be minimal.

graphs 321, 332, S. A. 86), and "would not appreciably affect the view from the east side of the Hudson River or the scenic beauty of the area." (Paragraph 336, S. A. 90). The Commission concluded that the location of the project underneath park lands would be a "beneficial dual use of a natural asset. * * * " (Paragraph 341, S. A. 90).[7]

The Commission finally made a series of short findings, summarizing its opinion, and including findings that the project was to be constructed with provision for future expansion to 3,000 megawatts as "* * * best adapted to a comprehensive plan for improving and developing the Cornwall reach of the Hudson River * * * " (Paragraphs 13, 23, S. A. 103-104).

3. Proceedings in the Court Below.

On petitions for review, the court below first held that its authority and responsibility were narrowly limited, referring to Section 313(b) of the Federal Power Act, 16 U. S. C. § 825 *l*(b), which provides that the findings of the Commission "* * * as to the facts, if supported by substantial evidence, shall be conclusive." The court took the familiar principle, that reviewing courts should defer to the "informed judgment of the Commission" with respect to industries regulated by the Commission and carried this principle over to the review of the Commission's evaluation of environmental impact (App. 5-6).

Applying this standard, the court held that the remand order in its earlier decision and the requirements of Section 10(a) of the Federal Power Act had been complied with since the Commission had considered all relevant factors and its findings were supported by substantial evidence (App. 12). The bulk of the opinion consisted of a summary of the Commission's conclusions on various aspects of the case.

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7. The Commission discussed the opposition to the project based on its impact on the fish life of the river, the danger to the Catskill Aqueduct, and the effect of the overhead transmission lines on the land across the river. In each case, the opposition was rejected in favor of power considerations (S. A. 69-80, 93-99).

Only after this did the court below turn to a consideration of NEPA. The court below held that the Commission had complied with all aspects of that Act as to consultation with other agencies and state and local groups, and that the Commission's opinion satisfied the requirement of the submission of an environmental impact statement under Section 102(2)(C) of the Act.

Circuit Judge Oakes dissented. He disagreed strongly with the highly restricted approach to review taken by the majority, warning that the efficacy of NEPA would depend, in large part, on the decision in this case (App. 40). He pointed out that judicial deference to administrative expertise was not required in every instance. Specifically, Judge Oakes stated that he dissented for the following reasons (App. 42):

> "* * * I think the FPC acted arbitrarily, abusing its discretion while purporting to act under the mandate of this court in *Scenic Hudson, supra;* because its findings in respect to the Catskill Aqueduct are inconsistent and insufficient; because its findings as to the effect of the project upon New York City air pollution are incomplete and fail to take into account relevant factors; and because the Commission's findings and conclusions show that it has not really followed the mandates of the National Environmental Policy Act of 1969, Pub. L. 91-190 (Jan. 1, 1970), 42 U. S. C. §§ 4321-47."

On petitions for rehearing and suggestion for rehearing *en banc*, the court below was evenly divided. Judge Hays, who delivered the opinion in *Scenic Hudson I* and the majority opinion in this proceeding, voted for rehearing *en banc*, as did Judge Oakes. Judge Timbers, who voted for rehearing, filed a dissent from the denial of rehearing, on the ground that the standard of review used by the panel presented "* * * a substantial question of unusual importance" (App. 95).

REASONS FOR GRANTING THE WRIT.

This controversy, from the first suggestion that a pumped storage facility be constructed at Storm King Mountain, has caused grave concern, nationwide in scope, among those concerned with the environmental crisis which the country faces. The Hudson Highlands form one of the most beautiful scenic areas in the United States and the most magnificent of the Highlands is Storm King Mountain. The proposed pumped storage installation, said to be the largest in the world, would scar Storm King, destroying its unique beauty, and would be the first major industrial intrusion into the Hudson Highlands.

In 1965, the court below, recognizing the special qualities and importance of Storm King Mountain and the Highlands, set aside the Commission's initial licensing order because of its failure, among other things, to have fairly considered the environmental values involved. In taking this action, the court emphasized the Commission's obligation to look to environmental factors as a part of its comprehensive planning responsibilities under Section 10(a) of the Federal Power Act, and the remand of the case was accompanied by specific directions that the Commission must take into account the preservation of natural beauty as a basic concern and must carefully weigh the "totality" of the project's long-ranged effects. Four years later, as Judge Oakes indicated in his dissent, these directions of the court were raised to the level of national policy, made binding on all Federal agencies, by the National Environmental Policy Act.

At the hearing on remand, the Commission received extensive testimony from an array of experts who were unanimous in their conclusion that construction of the project would irreparably damage Storm King Mountain. Yet despite the heightened emphasis that had been given to environmental protection in *Scenic Hudson I* and by NEPA, this testimony was, in the main, belittled or ignored, and in an elaborate but result-oriented opinion, the Commission

again concluded that power considerations required the licensing of the project. The opinion never squarely dealt with the central environmental values involved—the need to preserve the unique beauty of Storm King and the need to recognize the established course of future development of the Hudson Highlands area as park and wilderness. Instead, the Commission sought to downplay the significance of intruding a massive industrial plant into the Highlands by suggesting that Storm King would absorb the scars of the project as it had absorbed scars in the past and that the construction of a 57 acre picnic and playground area on the river, as an adjunct to the plant, would somehow be compatible with the *natural* grandeur of the area. The Commission did not even advert to the fact that Con Edison, during the pendency of this case, has supplied itself, following the lead of other major utilities, with the 2,000 megawatts of peak demand power, here said to be needed from Storm King, by the installation of gas turbines elsewhere.

In these and in other respects to be discussed below, the Commission failed to discharge its comprehensive planning responsibility under Secton 10(a). *A fortiori*, the Commission failed to discharge the duties imposed upon it by the National Environmental Policy Act, concededly applicable to the Commission's order and opinion in this case, which, as noted above, casts upon federal agencies, in enhanced form, the "basic concern" for the "preservation of natural beauty" which was enjoined upon the Commission by the 1965 decision of the court below.

NEPA was cited by this Court, along with other recent federal statutes, as "designed to curb the accelerating destruction of our country's natural beauty." *Citizens to Preserve Overton Park v. Volpe*, 401 U. S. 402, 404 (1971). The Court of Appeals for the District of Columbia, in *Calvert Cliffs' Coordinating Committee, Inc. v. Atomic Energy Commission*, 449 F. 2d 1109 (C. A. D. C. 1971), referred to these statutes as attesting to "the commitment of the Government to control, at long last, the destructive engine of material 'progress' . . .", describing NEPA as

"the broadest and perhaps the most important of the recent statutes . . . ." 449 F. 2d at 1109. The District of Columbia Court warned that "it remains to be seen whether the promise of this legislation will become a reality. Therein lies the judicial role." *Id.* See also *Environmental Defense Fund v. Corps of Engineers*, 331 F. Supp. 925 (E. D. D. C. 1971) where the court referred to the "clear priority Congress has recently given to preserving and protecting the Nation's natural resources—including but not limited to the National Environmental Policy Act . . . ."

The court below has failed to perform the "judicial role" referred to in *Calvert Cliffs'*. It abandoned the searching inquiry used in its 1965 opinion to determine whether the Commission had discharged its comprehensive planning responsibilities under Section 10(a). Instead, the court here held itself bound to a narrowly circumscribed review of the familiar type used and developed in ordinary Power Commission cases. On this basis, the court below, after reciting the Commission's conclusionary findings, affirmed the second licensing of the Storm King project. More importantly, the court below brushed aside the requirements of NEPA in two inaccurate paragraphs. The opinion observes, incorrectly, that the Commission had discharged its consultation duties under that section, and held further the Commission's opinion itself constituted a sufficient environmental impact statement.

The decision below with respect to the effect of NEPA is in sharp conflict with the decision of the Court of Appeals for the District of Columbia in *Calvert Cliffs'*, a decision which correctly recognizes the policy and procedural requirements of the statute. In the instant case, the Commission moved to its conclusion on the basis of familiar power considerations and failed entirely to discharge its responsibilities with respect to environmental values. No sufficient environmental impact statement was made or filed by the Commission. The court below accepted the Commis-

sion's position that, in a general way, it had discharged its responsibilities. If this comes to be the law, NEPA becomes a nullity. As the dissenting judge below observed, the efficacy of NEPA "* * * is in large part dependent upon the decision in the instant case." (App. 40). Review by this Court is of critical importance to the future of the Nation's program of environmental preservation and protection.[8]

1. The Commission's Opinion and Order Fails to Comply With Section 102(2)(C) of the National Environmental Policy Act.

In *Calvert Cliffs'*, the Court of Appeals for the District of Columbia analyzed the structure of NEPA, pointing out that the general substantive policy of the statute is flexible, leaving room for responsible exercise of discretion. But, to make certain of that responsible exercise of discretion, the Act contains procedural provisions which are not flexible but which, rather, require "rigorous procedures" to be followed, procedures described by the principal sponsor of the legislation as "action-forcing." 449 F. 2d at 1112, 1113. These "rigorous procedures," set forth in Section 102(2)(C), require each agency, when considering a project "significantly affecting the human environment," to file a "detailed statement" on five enumerated items, and to consult with other agencies concerned with the environment. *Calvert Cliffs'* observed that "all of these Section 102 duties are qualified by the phrase 'to the fullest extent possible' * * *"; that this requirement establishes "a strict standard of compliance" (449 F. 2d at 1114); and that this standard

8. The sharp conflict between *Calvert Cliffs'* and the decision below in this case as to the correct interpretation of NEPA mirrors the conflict and confusion developing throughout the courts in this rapidly expanding and critically important area of the law. The cases are collected in the Appendix, pp. 96-98. When available, the Federal Reporter system citation is given. The balance of the cases are cited to the Environmental Reporter.

"must be rigorously enforced by the reviewing courts." 449 F. 2d at 1112.

On the basis of this understanding, the court of appeals, in *Calvert Cliffs'*, examined and set aside rules promulgated by the Atomic Energy Commission purporting to be in compliance with Section 102. The action of the court below in this case is in sharp contrast. Here, the court came to the requirements of Section 102(2)(C) almost as an afterthought. It held that submission of the Commission's opinion to the Council on Environmental Quality was a sufficient compliance with NEPA, containing "explicit conformance with the enumerated portions of the required statement." (App. 36). The court below also held that the Commission had consulted with other agencies, including "* * * the Chief of Engineers, the Advisory Council on Historic Preservation, the Department of Interior, the Atomic Energy Commission and a number of state and local groups that stand to be affected." (App. 36).

The statement of the court below with respect to the Commission's compliance with the consultation requirement of the statute is incorrect. Section 102(2)(C) requires consultation as to environmental impact. The Chief of Engineers merely approved the project from the point of view of navigation (R. 24528, 25686). The comments of the Advisory Council on Historic Preservation were mandatory under the Historic Preservation Act of 1966 (80 Stat. 915). The Bureau of Outdoor Recreation of the Department of Interior, in a lengthy 1966 report on the Hudson River Valley, recommended that the Storm King plant "*not* be built". The Commission ignored the report and there is nothing in the record to indicate consultation with the Department of Interior with respect to the report. The record also fails to disclose any consultation with the Atomic Energy Commission. The most important of the state agencies, The Hudson River Valley Commission, was ignored by the Commission and no mention was made in the Commission's opinion of the fact that, in its report to

the Governor and Legislature of New York, that body had urged that the project *not* be built.[9]

There was, accordingly, no compliance by the Commission with the consultation requirement of Section 102(2)(C). Nor does the Commission's opinion contain "explicit conformance with the enumerated portions" of Section 102(2)(C). That section is not satisfied by "a purely mechanical compliance" but only by a "full good faith consideration of the environment" so that the section is not read so narrowly "as to erase the general import" of the policy and purpose of the statute. *Calvert Cliffs'*, 449 F. 2d at 1113, ftn. 5.

Judged by these tests, the Commission's "conformance" disappears, not only in the NEPA section of its opinion (Par. 211-218, S. A. 59-61), but in the opinion as a whole. Analysis of the Commission's responses to the items which, under the Act, the detailed statement must cover, makes this clear and, indeed, shows affirmatively that the Commission misunderstood its responsibilities under the Act. The whole purpose of the detailed state-

9. Less than a month after the Commission had given Con Edison its first license for the Storm King project, Governor Rockefeller appointed the Hudson River Valley Commission to develop a program for the protection of the Valley. That Commission's report, in the following year, opposed the Storm King project, declaring that scenic values at Storm King were "paramount." The Commission also recommended the creation of a compact between New York, New Jersey and the Federal Government of a permanent commission to guide the growth of the Valley, with high priority to be assigned to the Hudson Highlands. In response, the New York Legislature passed the Hudson River Valley Commission Act and some months later, Congress passed the Hudson River Basin Act in aid of the proposed program, declaring the future of the Hudson to be a matter of high concern to the entire country (80 Stat. 847).

Earlier, the New York Joint Legislature Committee on Natural Resources, after public hearings on Con Edison's project, had urged the use of alternatives which would avoid the "desecration" of the Gorge and eliminate the "great swathe of destruction" through the suburban counties. The report also noted the precedent for subsequent projects which the licensing of the Storm King project might establish.

ment is to provide a framework which will ensure individualized consideration to all important environmental factors. The Commission never proceeded within this framework and, as a consequence, never came to grips with the values NEPA is intended to protect. In short, as is shown below, by its failure to conform rigorously with the mandates of NEPA, the Commission fell into exactly those errors that NEPA is designed to avoid.

Item (i) calls for a detailed statement on "the environmental impact of the proposed action. . . ." The Commission's response to this item, when measured against the record, was grossly deficient. During the hearings, numerous experts who had spent their lives in the study of natural beauty and of man's surroundings described the grandeur of Storm King. They spoke of the magnificence of the surrounding hills and the breadth and depth of the Hudson cutting its course through the barrier of the Appalachians. They laid special emphasis on the *unique* beauty of the area (as the court below had done in its first decision), and declared it to be the equal of our national parks. They objected to the scenic damage to be done by each of the several elements of the project; and, in addition, it was their uncontroverted opinion that the injection of a power development into the area would destroy its *character*—its essential quality of rugged wildness and its capacity to lift man out of his mundane concerns (R. 4849, 4888-9). This focal point of all the testimony was never mentioned by the Commission, either in the NEPA section or elsewhere in its opinion.[10]

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10. The only experts called to justify the scenic aspects of the project were two men each of whom had a special interest to serve. One was an employee of Con Edison's engineers on the project, in charge of landscaping their work; the other a professional landscaper who had been commissioned by Con Edison to prepare planting plans for clothing portions of the project and who testified that engineering was the "No. 1" factor in the case (R. 11709). Although the opinion in *Scenic Hudson I* had discounted "self-serving

As to the specific damage, the Commission did not seek to measure it but sought to justify it by pointing to certain existing waterfront blight (easily removable by other means) and to the scar of a highway—an argument characterized by the dissenting opinion as "outrageous. . . . On the basis of the commission's thesis, wherever you have one billboard you can put two, wherever you have one overhead transmission line you can put another, you can add blight to blight to blight. That a responsible federal agency should advance that proposition in the form of a finding and in the teeth of the NEPA seems to me shocking" (App. 55).

Item (ii) calls for a detailed statement on "any adverse environmental effects which cannot be avoided should the proposal be implemented . . ." The Commission provided no such statement in the NEPA section and, while the body of the Commission's opinion referred to some of the adverse effects in the process of belittling them, it passed over in silence substantial and uncontroverted expert testimony regarding other such effects.[11]

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general statements by officials of Consolidated Edison", no notice of these conflicts of interest was taken by the Commission or by the court below.

11. This testimony included the following: (a) The *tailrace* cut into the mountain slope would be a permanent wound in the side of the mountain which could change the whole character of the scene; it would "cut the legs out from under the north flank of the mountain by destroying the continuity of its base as it rises out of the water"—a continuity "essential to the sweeping lift which gives the profile of Storm King its remarkable energy." (R. 4889, 12674-76). Similar testimony by two other experts appears at R. 4854-56 and R. 14784. (b) The 57-acre park, to be planted in the river on top of rockfill would be an incongruous intrusion upon the natural beauty of the area (R. 4870, 4890, 14784). Without at any point discussing this testimony, the Commission in the NEPA section hailed the establishment of the park, and in its order gratuitously ordered Con Edison to equip it with a public boat launching ramp (S. A. 115). (c) The *scenic overlook* to be built on Crows Nest Mountain near Storm King, with visitors' facilities and an approach road cutting across the face of the mountain, would result in objectionable scars (R. 12513-14).

Clearly, in requiring a detailed statement on adverse environmental effects, the Act intends thereby to make the agency face up to all of the environmental consequences, and to "ensure that those [environmental] values are in fact fully respected." *Calvert Cliffs'*, 449 F. 2d at 1111. The Act does not, as *Calvert Cliffs'* noted, compel any particular decision, but it does require the "individualized consideration" of environmental factors to be "conducted fully and in good faith", in the absence of which "it is the responsibility of the courts to reverse." *Calvert Cliffs'*, 449 F. 2d at 1115.

Item (iii) calls for a detailed statement on "alternatives to the proposed action . . ." Much of the body of the Commission's opinion contains a critique of power aspects of the alternatives but the environmental advantages that these offered by avoiding the desecration of Storm King Mountain were never mentioned. As for the NEPA section of the opinion, the alternatives were disposed of in the following single sentence which starkly revealed the Commission's lack of understanding of the environmental values at issue:

> "We conclude that none of the most likely proposed alternatives, including an all-nuclear unit or the mixed nuclear and gas turbine combination, could be sited within 100 miles of New York City with any less physical impact on the environmental aspects of the affected area than the Cornwall project." (Paragraph 215, S. A. 60).

The Commission's assimilation of other areas where alternatives might be located (such as existing industrial sites in New York City for gas turbines) [12] with the sur-

12. Since 1969, Con Edison, has installed more than 2,000 megawatts of gas turbines at industrial sites in New York City. See footnote 18. Similarly, nuclear plants are being added at other industrial sites (R. 12790, 12955-6). As to pumped storage facili-

passing grandeur of the Hudson Highlands and Storm King Mountain is inexplicable. Indeed, it misses the entire point which is that, because of their unique natural beauty, the Hudson Highlands are set apart from other areas and deserving of special protection for this reason.

Item (iv) calls for a detailed statement on "the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity . . ." To this the Commission responded in one sentence on which Judge Oakes commented as follows (the majority opinion being silent on this item, as on each of the others):

> "Here the commission's Finding 217 says, incomprehensibly, '[a]ny short term adverse impact on the natural environment is more than offset by the enhancement of long term productivity which will result from the project'. This is supposed to be a commission finding under NEPA, but I think the finding indicates that the commission did not read the Act very carefully. Section 102(2)(C)(iv), 42 U. S. C. A. 4332, requires a statement of 'the relationship between local short-term *uses* of man's environment and the maintenance and enhancement of long-term productivity' (emphasis supplied). Not the short-term *impact* on the natural environment, but the short-term *uses* of it in relation to long-term productivity, is the statement required. Here we are considering permanent structures, a long-term and substantial use of an area of great natural beauty, 'unique beauty,' in the words of *Scenic Hudson*, *supra*, 354 F. 2d at 613, involving an 'irreversible and irretrievable commitment of re-

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ties, the Commission's staff studies five other sites, but the staff, as well as the Commission rejected these solely on the basis of cost (R. 5344-5; Paragraph 122, S. A. 35). There was no discussion of environmental impact.

sources' in the proposed project if licensed, to use the language of Section 102(C)(v) of NEPA." (App. 58).

Item (v) requires a detailed statement on any "irreversible and irretrievable commitment of resources." To this the Commission responded (Par. 217, S. A. 61):

> "The resources which will be committed to the project are the acreage it will necessarily encompass and the fuel resources which will be committed to pumping energy. But the electric energy resources which will be generated by the commitment of such resources will many times over 'foster and promote the general welfare' and 'fulfill the social, economic and other requirements of present and future generations.' Section 101(a)."

The Commission's reference to the Hudson Highlands as merely "acreage" was another example of its lack of basic concern for environmental values. And no statement as to the "irreversible and irretrievable" commitments of resources was made above or in the body of the Commission's opinion, nor did its opinion face up to the fact that, to make way for a project which technological advances in the world of power might before long render obsolete, an area of unique beauty and of national importance would be permanently and irretrievably disfigured.

Subsection (D) of the Act went unnoticed by the court below. It requires federal agencies to "study, develop and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." The Commission dismissed the subsection by saying that "there is essentially no conflict concerning alternative uses of available resources because with the exception of the small part of the Black Rock Forest to be flooded by the

reservoir practically none of the other parts of the project preclude alternative uses of available resources" (Par. 213, S. A. 59). As Judge Oakes said in his dissent (App. 58-59), this finding "completely omits the conflicting alternative uses of preserving the area free from any utility installations, tail-races, abutments and access roads".

The logic of such an alternative use (quite apart from its avoidance of any impairment of the unique beauty of the area) lies in the fact that the Storm King site has become an enclave in park lands bounded to the south and in part to the west by the Palisades Interstate Park and across the river by the new Hudson Highlands State Park. By every principle of planning, the Storm King site should be reserved for ultimate acquisition as a state park, free from power installations which have no business in such a park.[13] The Commission's statement under subsection (D) that there is "essentially no conflict concerning alternative uses of available resources" simply cannot stand up. And the silence of the court below in accepting such a statement is one more illustration of its disregard of NEPA's imperatives.

* * *

In short, there was no full, good faith compliance by the Commission with NEPA requirements and the court below failed to discharge the duty of review cast upon it by that statute. In *Calvert Cliffs'*, in summing up the procedural requirements of Section 102, the Court said (449 F. 2d at 1112):

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13. Such an acquisition is authorized by Article XIV, Section 4, of the New York Constitution, which became effective January 1, 1970. It provided that "the policy of the state shall be to conserve and protect its natural resources and scenic beauty . . . ." and that the legislature "shall" provide for the acquisition of lands, and their dedication as part of the state nature preserve, "which because of their natural beauty, wilderness character, or geological, ecological or historical significance, shall be preserved and administered for the use and enjoyment of the people." Neither the Commission nor the court took note of this significant amendment to the New York Constitution.

> "Of course, all of these Section 102 duties are qualified by the phrase 'to the fullest extent possible.' We must stress as forcefully as possible that this language does not provide an escape hatch for foot-dragging agencies; it does not make NEPA's procedural requirements somehow 'discretionary.' Congress did not intend the Act to be such a paper tiger. Indeed, the requirement of environmental consideration 'to the fullest extent possible' sets a high standard for the agencies, a standard which must be rigorously enforced by the reviewing courts."

NEPA establishes high national policy, demanding full and good faith implementation by agencies and rigorous enforcement by reviewing courts. If permitted to stand, the approach of the Commission in this case to its NEPA duties, and the limited concept of its review role by the court below, would turn NEPA into a "paper tiger." This should not be permitted to happen.

2. The Commission Failed to Discharge Its Planning Responsibilities Under Section 10(a) of the Federal Power Act.

Under Section 10(a) of the Federal Power Act, the Commission cannot issue a license unless the project is

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14. As already noted, the court is now divided evenly on the petition for rehearing en banc in this case. Subsequently, a conflict has developed within the Second Circuit. On January 17, 1972, in *Scenic Hudson Preservation Conference v. Federal Power Commission* (Docket Nos. 71-1091, 71-1092), a panel of the court below, different in membership from the panel which heard this case, disapproved as violative of NEPA certain rules issued by the Commission to comply with the Act. The *Calvert Cliffs'* holding that NEPA "went far beyond the requirement that the agency provide evidence, analysis and balance these factors in the record subject to review by the courts." (F. 2d —). Section 102(2)(C) of NEPA was read as imposing a non-delegable duty on every agency to make a detailed environmental impact statement. As of this writing, a petition by the Power Commission for rehearing *en banc* asserting the conflict with the decision in the case, is pending before the court below.

"* * * best adapted to a comprehensive plan * * * for the improvement and utilization of waterpower development, and for other beneficial public uses, including recreational purposes. * * * " In its first *Scenic Hudson* decision, the court below, emphasizing the conservation-sponsored origin of the Federal Power Act and sensitive to the growing need for environmental protection, held that the phrase "recreational purposes" encompassed "the conservation of natural resources, the maintenance of natural beauty and the preservation of historic sites." (App. 69). In the court's view, Section 10 required the Commission to consider the "totality of the project's immediate and long-range effects, and not merely the engineering and navigation aspects." (App. 81). The Commission was ordered to consider the preservation of beauty as a "basic concern." (App. 80).

On remand, the Commission, in a brief discussion of Section 10(a), covered the "engineering and navigation" aspects of the project, and its recreational features in the narrow sense of picnic areas, but dealt not at all with the "totality" of its "long-range" effect (Paragraphs [illegible], S. A. 50-52). No consideration was given to the effect which the project would have on the established direction of planning in the Hudson Highlands and on the future character of the area.

Since its establishment in 1900 by the New York and New Jersey Legislatures, the Palisades Interstate Park, by a succession of gifts and legislative enactments, has steadily grown both westward and northward until now it has virtually engirdled the site chosen by Con Edison for its power plant and tailrace.[15]

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[15] In 1910, the New York Legislature extended the boundaries of the Palisades Interstate Park to Newburgh, north on Storm King, and to the Ramapo Mountains to the west (N. Y. Laws of 1910, Ch. 680). In 1937, the Palisades Interstate Park Commission was established by a compact approved by Congress, which provided that the lands should forever be preserved exclusively for park purposes. 50 Stat. 319, Ch. 760.

In 1963, the Hudson River Commission, as we have noted, opposed the project; it declared that "scenic values" were "paramount" in the Highlands, and urged that if the project were not built "the Storm King site be acquired by the state as park land and that other sites now under consideration for pumped storage plants in the Highlands area be similarly acquired." (R. 22-23). Since then, the Hudson Highlands State Park has been established, further emphasizing the course which future development of the area should take.

The Commission took no notice of the planned course of future development for the Hudson Highland area. Instead, it held that, since there were recreational facilities in both Palisades Interstate Park and Hudson Highland State Park, the project was compatible with developments in the area by reason of the recreational facilities which Con Edison planned to build for the Town of Cornwall. This is a clear instance of the tail wagging the dog. The presence of recreational facilities in huge public parks does not make a large industrial installation a compatible feature simply because it includes a recreational area. Further, recreational facilities in state parks are closely regulated whereas, on private lands, there are no such limitations and the future is left to take care of itself.

The precedential effects of licensing the project would also be serious, but were never considered. At least four other possible pumped storage sites in the Highlands exist (R. 5556). If utilities should apply for licenses to build on them, they would naturally argue that, if it was permissible to build a project at Storm King, by common consent the most magnificent portion of the Highlands, there could be no basis for rejecting others at less splendid sites.

When it came to the project itself, the Commission did not hesitate to plan for the future. It was at the Commission's instance that the project was designed so as to be capable of expansion—reservoir, powerhouse, and transmission lines—to 3,600 megawatts.[18] But, as to the future of the region, the Commission took refuge in the almost cynical use of the "recreational facilities" analogy. And it made no mention whatsoever of the Storm King licensing as a precedent for the Hudson Highlands area.[18] This disregard of the instruction to consider the "totality of the project's immediate and long-range effects" was passed over by the court below which simply stated that the Commission, having considered the recreational purposes of the project and the engineering and navigation features, had "thus performed the 'specific planning responsibility' entrusted to it by Congress in Section 10(a)." (App. 34). Here, again, there appears to be a conflict with the *Greene County* decision. In that case, the Commission took the position that Section 10(a) did not require analysis of future projects not presented in license applications. The court there differed, citing passages in the first *Scenic Hudson* decision and *Udall v. Federal Power Commission*, 387 U. S. 428 (1967).[18] The court there stated that, although these

[18] In *Scenic Hudson*, the Commission's failure to inform itself of Con Edison's future interconnection plans was held not to "be reconciled with its planning responsibility under the Federal Power Act." 354 F. 2d at 622. In *Udall*, this Court declared that a licensing decision "can be made only after an exploration of all considerations relevant to the 'public interest,' including future power demand and supply, alternate sources of power [and] the public interest in preserving reaches of wildness and wilderness areas." 387 U. S. at 450.

decisions "may not have established long-range planning requirements, they evidence a clear intent that the Commission at least should consider all available and relevant information in performing its functions."

The comprehensive planning responsibilities of the Commission under Section 10(a) have never been authoritatively defined by this Court. The days of simple river planning are over.[19] An authoritative decision by this Court is urgently needed, particularly in view of the mounting volume of environmental litigation and the enhanced responsibility of the Commission under NEPA and similar enactments.

3. The Court Below Erred in Adopting a Narrowly Limited Reviewing Function.

The court below held that only a narrowly limited scope of review, as defined by Section 313(b), 16 U. S. C. §825*l*(b), was available to it. That section provides that the findings of the Commission "as to the facts, if supported by substantial evidence, shall be conclusive." Citing, as authority, *Permian Basin Area Rate Cases*, 390 U. S. 747, 767 (1968), the court below stated (App. 6):

> "The licensing of projects such as the Storm King plant and the evaluation of their environmental impact has been entrusted to 'the informed judgment of the Commission and not to the preferences of reviewing courts.'"

Permian Basin, the source of the quotation within the above quotation, had nothing to do with the "licensing of

19. The Senate Report accompanying NEPA stated:

> "Important decisions concerning the use and the shape of man's future environment continue to be made in small but steady increments which perpetuate rather than avoid the recognized mistakes of previous decades." S. Rep. No. 91-296, 91st Cong., 1st Sess. 5 (1969).

projects such as the Storm King plant and the evaluation of their environmental impact." *Permian Basin* was a gas rate case and what this Court actually said in the quoted passage was that "[] Congress has entrusted the regulation of the natural gas industry to the informed judgment of the Commission [] []."[20]

The expert knowledge and the "informed judgment" of the Federal Power Commission is and always has been in the power field and it is only in this case that the Commission has been confronted with the question of the weight to be accorded to the preservation intact of an area of surpassing beauty. In this new and rapidly growing field of the law, an agency's evaluation must be governed by some form of standard which a reviewing court can apply. Only by the use of such standard of review can a court make certain that the agency has fulfilled "[] [] its expanded responsibility." *Greene County Planning Board, supra.*

Congress, in the body of recent environmental legislation culminating in NEPA, has supplied the standard. In a conflict between environmental protection and power needs, a strong presumption is created in favor of the former and the burden of rebutting this presumption falls upon the proponent of construction. See *Calvert Cliffs', supra*, p. 1109.

In the instant case, the Commission reversed the order of the presumption and the burden. The Commission stated (Paragraph 44, S. A. 12):

> "Simply put, the issue is whether the project offers substantially more reliable electric service as well as cheaper electricity generated in a cleaner manner than any other feasible alternative and, if so,

20. The court below also relied on *Gainesville Utilities Department v. Florida Power Corp.*, 402 U. S. 515 (1971), in which like *Permian*, the questions were in a "highly technical field," the judgment of which, this Court said, had been explicitly committed to the Commission, 402 U. S. 515 (citing *Permian Basin*).

whether the project will create detrimental aesthetic and environmental conditions of such degree as to lead on balance to a judgment that the public convenience and necessity would be better served by denying the application herein."

In keeping with this order of consideration, the Commission's opinion analyzed the alleged advantages of Con Edison's project, in power and cost terms, over alternates, and after that, when the project had been declared superior to all others, the environmental damage was considered and dismissed as minimal.

If the presumption had been in favor of the preservation of natural beauty from commercial intrusion and the protection of natural resources against the hazards of power installations, the Commission would have asked, with regard to each alternative, whether the degree of inferiority (if any) to the project in power and cost terms would be a price which society ought to pay for the sake of keeping intact the unique area of the Hudson Highlands and guarding against the risks to its resources.

Instead, the alternatives were dismissed *seriatim* in the lengthy power discussion and the chosen project was all that was left when the environmental question was taken up.[21] In other words, it was the project or nothing;

21. The Commission's discussion of alternatives was strongly result-oriented. The use of gas turbines as an alternative to the Storm King project was first proposed by *Scenic Hudson* in 1964, at a time when turbines were relatively new. In its 1965 opinion, the Commission brushed the use of gas turbines aside. Subsequently, the use of gas turbines, specifically designed for peaking and emergency needs, became widespread. Gas turbines have been installed for this purpose by major utilities in New Jersey, Chicago, Philadelphia, Baltimore, Long Island, Detroit, Southern California, and many other metropolitan areas. *18th Semi-Annual Electric Power Survey*, October, 1970 (Edison Electric Institute Publication No. 70-53). The best proof that gas turbines are well adapted to serve peaking and emergency needs was supplied by Con Edison. By now, Con Edison has installed more than 2,000 megawatts of gas turbine peaking capacity, a capacity which, in and of itself, represents an

and, given the Commission's view that the project had to go forward, the environmental detriments were inevitably belittled and deemed insufficient to justify denying a license.

The strongest statement of the standard we contend for appears in *Citizens to Preserve Overton Park v. Volpe*, 401 U. S. 402 (1971), with which of course this Court is thoroughly familiar. The case involved the Federal Aid Highway Act of 1968, which recited the "national policy that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and water fowl refuges, and historic sites." The opinion stated that "the very existence of the statute indicates that protection of park land was to be given paramount importance. The few green havens that are public parks were not to be lost unless there were truly unusual factors present in a particular case or the cost or community disruption resulting from alternative routes reached extraordinary magnitudes. If the statutes are to have any meaning, the Secretary cannot approve the destruction of park land unless he finds that alternative routes present unique problems." 401 U. S. at 412-413.

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alternative to the Storm King plant. FPC Monthly Reports, New York Power Pool, 1970; *EEI 48th Semi-Annual Electric Power Survey*, October, 1970, pp. 55-56. All of this was known to the Commission before it issued its opinion in this case. Con Edison's gas turbine installation was described in the Commission's *Review of Consolidated Edison Company 1969 Power Supply Problems and 10-Year Expansion Plans*.

Again, the Commission has warned repeatedly against the danger of developing large blocks of hydroelectric capacity at locations removed from load centers with limited transmission, and has urged that spinning reserve should be distributed over numerous small units so that "response to sudden generation demands can be spread over as many units as possible." 1968 FPC Report, p. 55. Yet, here, the Commission found exactly the opposite type of installation to be the best suited to meet a projected 75% of Con Edison's emergency reserve. Other criticisms of the Commission's discussion of alternatives are contained in the record. The illustrations here given are enough, it is submitted, to show the result-oriented nature of the Commission's discussion of alternatives in this case.

The analogies to the instant case are evident. The statutory requirements as construed by this Court correspond to the requirements of NEPA as construed by *Calvert Cliffs'* and *Environmental Defense Fund v. Corps of Engineers*. The petitioners in *Overton Park* contended it was the exclusive province of the Secretary of Transportation to balance the detriment to parks lands against factors of cost, safety, etc. in alternative routes—essentially the position taken by the Federal Power Commission, with the approval of the court below, regarding its own balancing function. This Court, however, rejected any such uncontrolled discretion and articulated the standard which the Secretary was to follow.

The court below rejected this reasoning on the ground that this Court had said that the ultimate standard of review was a "narrow one" and that the court was "not empowered to substitute its judgment for that of the agency." 401 U. S. at 416. The court below cited similar statements in its first *Scenic Hudson* decision, App. 8 and in *Udall*, 387 U. S. at 450. It does not follow from this, however, that a reviewing court would be relieved of its responsibility to scrutinize the record and to ascertain whether or not the agency in arriving at its judgment had in fact observed the controlling standards.

The court below recognized its responsibility with respect to only one consideration—namely, that the record was full and complete. Having found this to be the case, the court shut its eyes to the manner in which the Commission had gone about its evaluation. Though pressed to do so by the petitioners, it paid no heed to the "basic concern" standard laid down in its earlier environmental instructions, and failed to consider the arbitrary ways in which the Commission had accorded priority to power considerations at the expense of the environment.

We submit that if the decision of the court below is allowed to stand as an authoritative expression of the responsibilities of reviewing courts in environmental cases,

it will reduce the judiciary to rubber-stamping administrative action whenever the agency has assembled what appears to be a "full" enough record and has sufficiently professed its desire to protect the [redacted]. If so, the National Environmental Policy Act will become, in the words of *Calvert Cliffs'*, a "paper tiger."

CONCLUSION.

For the foregoing reasons, petitioners pray that the petition for a writ of certiorari be granted.

Respectfully submitted,

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Appendix.

1971 OPINION

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Before: FRIENDLY, *Chief Judge*.
HAYS and OAKES, *Circuit Judges*.

Petitions for review filed pursuant to Section 313(b) of the Federal Power Act, 16 U. S. C. § 825(b) (1964) seeking to set aside an order of the Federal Power Commission dated August 19, 1970 granting a license to Consolidated Edison Company of New York, Inc. to construct a pumped storage power plant on the Hudson River.

Petitions denied.

HAYS, *Circuit Judge*:

By Opinion No. 584, dated August 19, 1970, the Federal Power Commission granted a license to Consolidated Edison Company of New York, Inc., to construct, operate, and maintain a pumped storage project along the western shore of the Hudson River at Cornwall, New York. Eight parties[1] have filed petitions pursuant to Section 313(b) of

[1] All of the petitioners except Palisades Interstate Park Commission object to the licensing order of the Federal Power Commission in toto. The Palisades Interstate Park Commission opposes only the site 2 alternative which calls for the location of the powerhouse within Palisades Interstate Park. The objection of petitioner City of New York is based on the aqueduct and air pollution question alone. The Izaak Walton League of America rests its objection primarily on the fisheries question and other environmental factors. All other petitioners raise virtually all the issues discussed in this opinion. Intervenor Consolidated Edison Company of New York, Inc., supports the Commission's order, as does intervenor Town of Cornwall.

the Federal Power Act, 16 U. S. C. § 825 *l*(b) (1964) seeking to set aside this order on various grounds. The issues raised by these petitions are both complex and important, involving, as they do, the conflict between the needs of a highly technological society and the increased awareness of environmental considerations.

The opinion and order of the Federal Power Commission presented here for review follow by five years the earlier remand by this court in *Scenic Hudson Preservation Conference v. Federal Power Commission*, 354 F. 2d 608 (2d Cir. 1965), *cert. denied sub nom., Consolidated Edison Co. of New York v. Scenic Hudson Preservation Conference*, 384 U. S. 941 (1966), in which the petitions challenged three 1965 orders of the Commission licensing the project and refusing to reopen proceedings and take additional evidence on various issues. In the intervening period extensive hearings have been held, two decisions have been rendered by a Hearing Examiner and the Commission has issued its own opinion.

The new proceedings have produced a project that is different in some ways from the project that was before this court in 1965.

The functional elements of the project remain the same. It is still to be the largest pumped storage plant in the world and its principal function, to provide energy for peak load periods, is unchanged. The proposed location is the same as that previously proposed, the Hudson River at approximately river mile 56.5, about 40 miles north of New York City at Storm King Mountain near Cornwall, New York, "an area of unique beauty and major historical significance." *Scenic Hudson*, *supra* at 613. The project would consist, as did the earlier version, of an upper reservoir, a tunnel between the reservoir and the powerhouse, and the powerhouse itself, a pumping-generation station located at the riverside containing eight reversible

pump-turbine and motor generation units as well as switching gear and primary transmission lines. However, unlike the project presented in 1965, which provided for a powerhouse that was 80 per cent underground, the powerhouse now licensed by the Commission is to be entirely underground.

The upper reservoir would be situated approximately 10,000 feet south and west of the powerhouse in a natural mountain basin behind Storm King Mountain. When filled to its maximum elevation it would have a surface area of 240 acres. It would be formed and enclosed by five earth and rock dikes. The lower reservoir would be the Hudson River itself.

The capacity of the eight pumping-generating units in the powerhouse would be 2,000 megawatts, or 2,000,000 kilowatts.[2] However, the project would be constructed in a manner which would permit enlargement to a maximum of 3,000 mw. Eight discharge tunnels from the reversible pump-turbine and motor generation units would convey water between each turbine and an open tailrace leading to the river. The tailrace with abutments at both ends would run 685 feet along the river. A fish protective device is to be located in front of the tailrace intake.

The third major facet of the project relates to transmission facilities. Submarine cable installations and spare pipes would transmit the energy generated in the powerhouse under the Hudson River and would continue underground on the east side of the river for approximately 1.6 miles to a point out of sight of the river. At this point overhead transmission would commence and would continue for approximately 9.2 miles through Putnam County to Con Edison's existing Pleasant Valley-Millwood-Sprain

2. One megawatt (mw) equals 1 million watts; one kilowatt (kw) equals one thousand watts. We will use the megawatt terminology throughout this opinion.

Brook transmission right of way. Changes have been made in the proposed route and the towns of Cortlandt, Putnam Valley and Yorktown, which challenged the route before this court in 1965, no longer do so.

The project would function in the manner described in our earlier opinion. *Scenic Hudson, supra* at 612. The units in the powerhouse would use off-peak energy generated not at the project but at other facilities in the Con Ed system to pump water from the Hudson River to the upper reservoir. When needed for peak power production, that is, during hours of highest kilowatt demand, the units would reverse direction of rotation and provide power derived from the fall of the water released into the river from the upper reservoir. This power would then be transmitted through the transmission system described above. "The water in the upper reservoir may be regarded as the equivalent of stored electrical energy; in effect, Consolidated Edison wishes to create a huge storage battery at Cornwall." *Scenic Hudson, supra* at 612.

A visitor's information center and picnic and parking facilities, proposed in the original project for the powerhouse site, have been eliminated. In their place, a 57 acre, mile-long park is to be constructed along the riverfront. Additional recreational facilities are to be provided at a 26 acre scenic overlook inland from the project with access from the existing State Highway 9-W.

As an alternative the Commission has licensed the powerhouse aspect of the project at a location within Palisades Interstate Park, approximately one and one-half miles downstream from the Storm King Mountain site. Construction at the Palisades site is to be considered approved by the Commission only if construction at the Storm King Mountain site "shall be precluded on a petition to review this order."

The petitions in this case are occasioned by the "grave concern" aroused among conservationist groups by the Storm King project. *Scenic Hudson, supra* at 612. The petitions allege lack of compliance with the terms of our earlier remand, absence of substantial evidence to support the Commission's findings, and failure to comply with statutory mandates. We find, however, that the Commission has fully complied with our earlier mandate and with the applicable statutes and that its findings are supported by substantial evidence. *In view of the extensive powers delegated to the Commission and the limited scope of review entrusted to this court, it is our duty to deny the petitions.*

I.

Congress has given the Federal Power Commission broad responsibility for the development of national policies in the area of electric power. In Section 4(e) of the Federal Power Act, 16 U. S. C. § 797(e) (1964), the Commission is authorized

> "To issue licenses . . . for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from, or in any of the streams or other bodies of water over which Congress has jurisdiction. . . ."

There are statutory limitations on the issuance of such licenses. Section 10(a) of the Act, 16 U. S. C. § 803(a) (1964), requires

"That the project adopted . . . shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of waterpower development, and for other beneficial public uses, including recreational purposes. . . ."

The Commission is now obliged also to consider the environmental factors covered by the National Environmental Policy Act, 42 U. S. C. § 4321 *et seq.* (Supp. 1971).

In the Federal Power Act Congress granted the Commission "sweeping authority and a specific planning responsibility." The Act "was the outgrowth of a widely supported effort on the part of conservationists to secure the enactment of a complete scheme of national regulation which would promote the comprehensive development of the nation's water resources." *Scenic Hudson, supra* at 613 and authorities cited there.

The scope of review of the Commission's exercise of its authority and responsibility is narrowly limited. The Act, § 313(b), provides that "[t]he finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive." 16 U. S. C. § 825 *l*(b). In assessing the factual contentions raised in the petitions, this court's authority "is essentially narrow and circumscribed." *Permian Basin Area Rate Cases*, 390 U. S. 747, 766 (1968). The licensing of projects such as the Storm King plant and the evaluation of their environmental impact has been entrusted to "the informed judgment of the Commission, and not to the preferences of reviewing courts." Id. at 767.

The statutory standard of substantial evidence is "something less than the weight of the evidence and the

possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Federal Maritime Commission*, 383 U. S. 607, 620 (1966). In a recent case involving these principles of court review, the Supreme Court said:

> "Insofar as the Court of Appeals' opinion implies that there was not substantial evidence to support a finding of *some* benefits, it is clearly wrong. And insofar as the court's opinion implies that the responsibilities assumed by Gainesville in combination with the benefits found to accrue to Florida Power were insufficient to constitute 'compensation . . . reasonably due,' the Court of Appeals overstepped the role of the judiciary. Congress ordained that that determination should be made, in the first instance, by the Commission, and on the record made in this case, the Court of Appeals erred in not deferring to the Commission's expert judgment." *Gainesville Utilities Department v. Florida Power Corp.*, 402 U. S. 515, 527 (1971).

Petitioners would have us reject these familiar principles because, they argue, different standards ought to prevail with respect to issues arising in an environmental context.[3] There is an effort to find a basis for this position in our earlier remand in *Scenic Hudson* and in cases which have taken a similar approach.[4] See, *e.g.*, *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U. S. 402 (1971); *Udall v. Federal Power Commission*, 387 U. S. 428 (1967); *Zabel v. Tabb*, 430 F. 2d 199, 213 (5th Cir. 1970), *cert. denied*, 401 U. S. 910 (1971).

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3. Sive, *Some Thoughts of an Environmental Lawyer in the Wilderness of Administrative Law*, 70 Colum. L. Rev. 612 (1970), seeks to provide support for such a position.

4. *Id.* at 631 *et seq.* and 650-51.

To read these cases as sanctioning a new standard of judicial review for findings on matters of environmental policy is to misconstrue both the holdings in the cases and the nature of our remand in *Scenic Hudson*. An element common to all these cases was the failure of an agency or other governmental authority to give adequate consideration to the environmental factors in the situations with which they were presented. In *Citizens to Preserve Overton Park, Inc. v. Volpe*, *supra* at 416, for example, the Court remanded the case to the district court to determine whether the Secretary of Transportation's decision "was based on a consideration of the relevant factors." The Court pointed out that "[a]lthough this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency." Id. In *Udall v. Federal Power Commission*, *supra* at 450-51, the remand to the Commission instructed it to explore the "neglected phases of the cases" and to make "an informed judgment on these phases of the cases." The Court explicitly stated that it expressed "no opinion on the merits." It added, "It is not our task to determine whether any dam at all should be built or whether if one is authorized it should be private or public." Id. at 450.

In our opinion in *Scenic Hudson*, *supra*, remanding the 1965 orders of the Commission, we were careful to make it clear that we were raising no question of change in the basic standard of administrative review and that the purpose of our remand was only to require the proper performance of its functions by the Commission. We said:

> "While the courts have no authority to concern themselves with the policies of the Commission, it is their duty to see to it that the Commission's decisions re-

ceive that careful consideration which the statute contemplates." Id. at 612.

. . . .

"This court cannot and should not attempt to substitute its judgment for that of the Commission. But we must decide whether the Commission has correctly discharged its duties . . . . The Commission must see to it that the record is complete." Id. at 620.

Where the Commission has considered all relevant factors, and where the challenged findings, based on such full consideration, are supported by substantial evidence, we will not allow our personal views as to the desirability of the result reached by the Commission to influence us in our decision. We now turn therefore to an examination of whether our remand has been complied with, whether there is substantial evidence to support the Commission's decisions on the issues remanded and other challenged issues, and whether the Commission has complied with all applicable statutory requirements.

II.

In our opinion remanding this proceeding to the Commission we directed the Commission to weigh a number of factors which we believed had not been given adequate consideration. Holding that "recreational purposes" in § 10(a) of the Act (16 U. S. C. § 803(a) (1964)) "encompasses the conservation of natural resources, the maintenance of natural beauty, and the preservation of historic sites," we required the Commission "properly [to] weigh each [such] factor." *Scenic Hudson*, *supra* at 614. We held "that the Commission is under a statutory duty to give full consideration to alternative plans" (Id. at 617). We criticized the Commission's refusal to "receive proffered

information on fish protective devices and underground transmission facilities . . . . ." Id. at 620, and directed it to "take the whole fisheries question into consideration before deciding whether the Storm King project is to be licensed." (Id. at 624). We ordered the Commission to weigh "the aesthetic advantages of underground transmission lines against the economic disadvantages" (Id. at 623). In sum the Commission was admonished to "re-examine all questions on which we have found the record insufficient and all related matters." (Id. at 624).

On January 25, 1966, acting on our remand, the Commission ordered that further proceedings be commenced before a Hearing Examiner. In that order the Commission said:

> "We do not understand the Court's order as restricting any further proceedings to the specific matters on which it found the present record insufficient to support our previous determinations and we do not believe it would be in the public interest to do so. The record in the first two hearings in the proceeding will, of course, be part of the present hearing. But all parties will be free to offer timely presentations of evidence on all matters relevant to the question whether a license should be granted."

The hearings were commenced on November 14, 1966 and with several brief recesses, were concluded on May 23, 1967. A motion of the State of Connecticut's Board of Fisheries and Game to intervene was subsequently granted, and further hearings were held on the issue of the protection of fish. These hearings were closed on October 16, 1967. On August 6, 1968, the Hearing Examiner issued his Initial Decision recommending that Con Ed be granted a 50 year license for the project. On November 19, 1968, the

proceedings were reopened in response to a petition by the City of New York to intervene and introduce evidence on possible hazards to its Catskill Aqueduct. At this proceeding, further evidence was taken on the alternative site in Palisades Interstate Park. The Hearing Examiner issued a Supplemental Initial Decision on December 23, 1969, which concluded that the project did not endanger the Aqueduct and that the alternative site was "not a proper and preferable alternative location for applicant's projected project." In all other respects, except for minor items,[2] the Initial Decision remained unchanged.

The proceedings on remand involved 100 hearing days, the testimony of some sixty expert witnesses, and the introduction of 675 exhibits. The record comprises more than 19,000 pages. Both the Hearing Examiner and the Commissioners arranged with the parties to visit the proposed site and the surrounding area before rendering their decisions.

On August 19, 1970, the Commission issued its decision. In its opinion the Commission reviewed the power needs of the area served by Con Ed and considered possible alternatives to the Storm King project in terms of reliability, cost, air and noise pollution, and overall environmental impact. Concluding that there was no satisfactory alternative, the Commission evaluated the environmental effects of the project itself. It held that the scenic impact would be minimal, that no historic site would be adversely affected, that the fish would be adequately protected and that the proposed park and scenic overlook would enhance recreational facilities. The Commission found that further

2. The Initial Decision was amended only to provide for the relocation of a switching station at Cornwall on Applicant's main transmission system instead of Kent and for the redesign of the Cornwall East switching station and the Storm Hill transformer gallery, in connection with the relocation of circuit breakers, bus and related equipment. . . ."

undergrounding of transmission lines would result in unreliability in the delivery of power and would be too costly. The Commission determined that construction of the project would entail no appreciable hazard to the Aqueduct.[6]

We find that the proceedings of the Commission and its report meet the objections upon the basis of which we remanded the earlier determination. Examination of the Commission's conclusions and the evidence on which the conclusions are based establishes that the Commission has complied with our instructions and that the evidence supporting the Commission's conclusions amply meets the statutory requirement of substantiality.

A. "*Alternative plans.*"

The Commission gave detailed and comprehensive consideration to alternatives. Its initial statement of the basic issues of the case before it and the manner of its subsequent dealing with those issues demonstrates that there is no sound basis for petitioners' contention that the Commission's approach was too narrow. The Commission said:

> "The weighing of social values required by the concept of the public convenience and necessity in this case involves on the one hand the alleged greater and much needed reliability, economic savings, and anti-air pollution benefits which this project offers compared with any feasible alternative, and on the other hand the alleged aesthetic and environmental detriment the project would impose on an area of great scenic, natural and historic value.

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[6] The Commission, disagreeing with its Hearing Examiner, authorized use of the alternative site within Palisades Interstate Park on the condition to which we have referred above. In view of our denial of the petitions in this case, it will be unnecessary for us to review this last determination.

> Simply put, the issue is whether the project offers substantially more reliable electric service as well as cheaper electricity generated in a cleaner manner than any other feasible alternative and, if so, whether the project will create detrimental aesthetic and environmental conditions of such degree as to lead on balance to a judgment that the public convenience and necessity would be better served by denying the application herein."

In deciding this issue the Commission proceeded to evaluate the needs of Con Ed and the probability that the proposed project would supply these needs in a more desirable way than would the possible alternatives.

The Con Ed system serves the densely populated area of New York City's five boroughs and part of Westchester County. The electric load requirements that Con Ed must meet are constantly growing. The Commission found that in 1970 Con Ed's capacity would be approximately 10,126 mw, plus 520 mw contracted from other utilities. However, much of the system is outdated and about 2,000 mw of its present capacity are due to be eliminated by 1978. And yet by 1979, Con Edison's annual peak load[7] will be approximately 10,850 mw.

Two factors were cited by the Commission as necessary to insure availability of the required amount of energy and to prevent major power failures, such as that which occurred in the northeast United States in 1965, as well as the lesser "brownouts" and "blackouts" which have become all too frequent in the New York area. The first of these two factors is the existence of adequate power facilities to meet the growing demand for electrical energy in

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7. The Commission noted that the annual peak loads have shifted from the winter season to the summer

the area served. The second is an adequate "reserve," a part of which must be what is called a "spinning reserve."[8] This "spinning reserve" is provided by units operating at less than full capacity but synchronized to the system so that the energy generated by them will all be immediately available to meet an increase in loads. It is this latter need that the Storm King project is designed to meet.

The Commission found that in order to prevent a major power failure the "spinning reserve" must be fully available within two minutes.[9] The Commission expressed the opinion, based on the record before it, that "if Cornwall or a pumped storage equivalent with its very fast pick-up characteristics had been available the blackout of 1965 might have been avoided."

The Commission examined in detail the possibility that there were alternatives more desirable than the Storm King project which would be capable of meeting these needs. Our earlier opinion required the Commission to consider the use of gas turbines. The Commission determined that using gas turbines alone would not be a feasible alternative to a pumped storage unit since the turbines would be less reliable and more expensive. Gas turbines, the Commission found, take between three minutes and ten seconds and four minutes to be brought to full operation from a cold start. Moreover, the Commission stated, unlike pumped storage units, gas turbines have a relatively low capacity for storage of rotational energy, and thus do not provide as substantial a cushioning effect in the event of a disturbance.

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8. See Prevention of Power Failures, A Report to the President by the Federal Power Commission July 1967, Volume I at 43-44.

9. "It appears from the evidence that to be effective in such an event 50 to 75% of the spinning reserve should be synchronized and available in 30 seconds to one minute, with all of the reserve available within two minutes."

Gas turbines were found to be considerably more expensive to operate than pumped storage units. The Commission adopted the conclusion of a staff study that the operating costs of a pumped storage project would be at least $119,000,000 less over a twenty-year period than the operating costs of gas turbines.[10] It would cost about $38,000,000 less, the study estimated, to construct the pumped storage project than to provide the gas turbines.

The Commission also considered the possibilities of a project composed entirely of nuclear units but found that such an alternative would be inadequate for reasons which are fully developed in the report. The Commission was of the opinion that a nuclear-gas turbine combination[11]

> "suffers from the shortcomings inherent in its components, that is, unless the gas turbines are spinning they cannot be brought into operation soon enough to meet emergencies and the nuclear component has relatively slow response characteristics which when combined with the forced outage reduces the reliability quotient of such a combination."

"[T]he reliability quotient of a nuclear-gas turbine combination," the Commission said, "is far less than Cornwall's."

The Commission estimated that construction of the nuclear-gas turbine alternative would cost $158,794,000 more than Cornwall. On the basis of these findings the Commission said:

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10. A Con Ed study had estimated a twenty year operating savings of $137,023,000.

11. Several combinations of gas turbines and a nuclear unit were proposed. Con Ed believed that eight gas turbines would be required, Scenic Hudson, five. The staff study concluded that six somewhat larger units would be adequate. The Commission based its conclusions on the combination found by the Examiner to be most appropriate: seven-turbine units coupled with a 1000 mw nuclear unit.

"We do not accept the proposition put forth by Scenic Hudson that this extra cost is *de minimis* when spread among all of Con Ed's customers. There are often good reasons why it is in the public interest to utilize a more expensive alternative. In appropriate cases the extra cost may even be substantial. But whether substantial or not, the extra cost must be justified by a showing that the alternative is in the public interest. There has been no showing that a combination nuclear-gas turbine alternative offers any advantages or indeed is even reasonably equivalent to Cornwall."

The Commission also considered the feasibility of using power purchased from outside sources to supply Con Ed's needs as an alternative to building the Storm King plant. It found that the maximum amount that could be assured would be sligltly in excess of 1000 mw.[12] Thus, this alternative, the Commission held, would not provide sufficient power.

Petitioners do not suggest that interconnections alone could provide a feasible solution. Scenic Hudson proposed a combination of 810 mw of purchased power with gas turbines. However since the gas turbines in this combination would *not* be used to generate spinning reserves but to take on the load, the Commission found that this alternative would not serve the principal function for which the Storm King project is designed:

"In view of the assumption inherent in this suggestion by Scenic Hudson that the gas turbines would

12. The New York Power Pool consists of the Upstate New York System and the Southeastern New York Companies (SENY). The Commission estimates that the seasonal exchange between these two would amount to 500 mw in 1975 taking into account the requirements for maintenance of generating capacity. Another 465 mw could be secured from the New England Power Pool and the Pennsylvania-New Jersey-Maryland Power Pool.

not operate as a spinning reserve, the spinning reserve would have to come from the purchase sources if this alternative is to be comparable to Cornwall. Accordingly this possibility cannot be deemed reliable, since such purchases would not be available in the event of a separation, the very time they would be most needed."

The Commission also examined the possibility of alternative sites for a pumped storage project. As the Commission points out, none of the petitioners offered any evidence on possible alternative hydro-electric sites. However, both Con Ed and the Commission staff conducted extensive surveys to determine if such alternatives existed within a hundred mile radius of New York City. Detailed studies for five such sites showed that they would be more costly and less reliable than the Cornwall project. All of them would require the construction of long transmission lines. For example, the Bashbish site, in New England, would require a transmission system of between 32 and 56 miles, with attendant effects on the surrounding land, as compared to the 9.2 miles of overhead corridor planned for the Cornwall project.

In its examination of alternatives the Commission considered their effect on air pollution, noise pollution and the overall environmental situation. Nuclear energy was found by the Commission to be the method of generation of electric power involving the least pollution. However since nuclear energy by itself is inadequate for peaking purposes, the effect on air pollution must be measured with relation to gas turbines, operating either as part of a nuclear-gas turbine system or operated partly loaded as spinning reserve. The Commission pointed out that the peaking energy generated at the Cornwall project is itself pollution free. Whatever pollution results from the oper-

ation of the project will be caused by the plants which supply the power for pumping the water into the reservoir. As the Commission said, "if the energy necessary to pump Cornwall comes from polluting power plants in New York City that would otherwise be idle, little or nothing would be gained in reducing the air pollution problem." The Commission concluded, however, that "water for Cornwall will normally be pumped by use of electric energy from non-polluting sources . . . . ." The Commission believed that construction of the Cornwall project would permit a more rapid replacement of old relatively inefficient steam-electric plants with large nuclear plants. Even during the early years of the project's operation, because pumping would take place during off-peak hours, i.e., at night, "cleanburning" natural gas would probably be available in amounts sufficient to meet a large part of the Cornwall requirements.

The Commission pointed out that proposed alternative methods of meeting Con Ed's need for power, since they too require construction of new facilities, would have an overall impact on the physical environment similar to that to which the opponents of the Cornwall project are objecting.

> "Still another approach to weighing 'alternatives to the proposed action' from an environmental standpoint is to compare the operational consequence to the envirnoment of the Cornwall project with similar consequences which would result from any reasonable alternative project. We conclude that none of the most likely proposed alternatives, including an all-nuclear unit or the mixed nuclear and gas turbine combination, could be sited within 100 miles of New York City with any less physical impact on the environmental aspects of the affected area than the Cornwall project."

B. "*The conservation of natural resources, the maintenance of natural beauty, and the preservation of historic sites.*"

The Commission gave extended consideration to the environmental aspect of our remand order. Testimony was taken from "a veritable 'Who's Who' of conservation, each witness discussing a different facet of the esoteric and subjective matter." The Commission said: "[O]ur conclusion that the license must issue does not rest upon any discounting of the case made by the intervenors relating to the natural beauty, historical significance, and spiritual qualities of the Storm King Mountain in its setting." Its essential finding in this regard was that the Cornwall project, as modified by the Commission to make any structures not buried "as unobstrusive as ingenuity can make them," constitutes "no real impairment of the environmental and scenic aspects of the Highlands."

The original plan for the project provided for a powerhouse that would be 80 per cent underground. The project licensed by the Commission now calls for the powerhouse to be completely underground. While in an area visually part of Storm King Mountain, the powerhouse would not be under the mountain itself but in the Village of Cornwall "on a small river-bottom foothill." Scenic Hudson's witness Vincent J. Scully, professor of art and architecture at Yale University, although he was opposed to other features of the project, stated that the underground powerhouse itself did not "enter into the problem of visual relationship." The external features of the powerhouse site would all be located below the cut of Storm King Highway on the mountain.[13] The only features on the powerhouse site which would be aboveground would be the en-

13. The highway crossed the mountain at an elevation varying from 200 feet to 280 feet. The height of Storm King Mountain is 1,343 feet.

trance to the underground plant, an access road, and the tailrace. The Commission said that "the land surface above the power station will be planted and as much of the existing growth as possible preserved."

The tailrace and abutments would be located at the river's edge, in an area partially occupied at present by a decidedly unscenic railroad bridge. The tailrace would be 685 feet long, with a vertical rock cut rising from 10 to 32 feet above the river. At the east end of the tailrace the visible height of the cut would be at most 20 feet above the existing railroad bridge. At the west end, the cut would be completely obscured by the existing bridge. The Commission pointed out that the "planting of vines on the rock face behind the tailrace would further serve to ameliorate the view from the river." With respect to the effect of the construction of the tailrace on the view of the mountain, the Commission said:

> "The tailrace would be located where the river widens above the gorge and curves west by north, above the powerhouse. From the bank directly across the river the distance is 4000 feet. Because of the curved shoreline at that distance, at the river level there would be no direct view of the tailrace."

The tailrace and the vertical cut would not, therefore, destroy a scenic, unspoiled view of the mountain. They would in large part be hidden from view by existing man-made structures or natural phenomena. The scenic impact of that part of the tailrace and cut that would be visible are to be evaluated not in terms of the number of square feet potentially visible but in terms of the entire visible panorama. The total area that would be occupied would be minuscule in proportion to the total area encompassed within a viewer's peripheral vision. The Commission could

reasonably find that with the river in the foreground and the mountain majestically rising 1343 feet behind, the tailrace and the vertical cut would not seriously impair the mountain's scenic aspects.

The Commission found, in summary, that:

> "Limiting the external features at the powerhouse site to the portal entrance, tailrace, and access road, totalling approximately 3 or 4 acres—out of Storm King's total of over 400 acres—should reduce to a minimum the visual impact on the scenic vistas of Storm King Mountain or the Highland Gorge of the Hudson River and thereby preclude any material scenic impairment or detriment."

The reservoir would not be on Storm King Mountain itself but behind the mountain from the river about two miles south and west of the powerhouse site, on lands owned in part by the Village of Cornwall and in part by Harvard University.[14] It would not be visible from the river; its visibility from other points "varies in relation to the elevation and distance of the view." From many of the points from which the reservoir can be seen various industrial developments can be seen as well.

The Commission found that, although the 240 acre reservoir will be larger than any of the other nearby bodies of water, "in the scale of the area it does not reasonably appear to dwarf the scene. Nor should it be materially different in appearance from ponds in the area and thus should not be deemed incongruous with the present character of the area."[15]

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14. The part owned by Harvard is a portion of Black Rock Forest, a 3,700 acre experimental tract of timber. About 240 acres at the east end of the forest would be acquired for the project. The remaining land will be unaffected.

15. The Commission noted that all large ponds in the area are artificial.

Finally with respect to the contention that the inside walls of mud, or rock-fill, would be exposed as the reservoir rises and falls, the Commission found that the rock and earth comprising the dikes would not be out of character with the rock and bare spots common in the Highlands and that "[t]he plantings and natural growth which would add here to the exterior and possibly interior surfaces of the dikes would also serve to ameliorate any intrusion of the reservoir and dikes on the natural scene."

The Commission's criticisms led to the substantial modification of the recreational aspects of the project. Con Ed's original proposal included an information center and recreation area to be located in the vicinity of the powerhouse site. These features were eliminated by the Commission. The Commission approved the construction of a riverfront park and a scenic overlook. The park is to be built on the rock excavated from the site of the power plant. It would be located in that part of the river to the north and west of the project adjacent to the shoreline. This 57 acre mile-long recreational facility, to be linked by two bridges to the Town of Cornwall to which it will be transferred upon completion, is to consist of play areas, picnic sites, shelters, and sanitary facilities. The scenic overlook is to occupy a 36 acre tract abutting State Highway 9 W, and would also include picnic sites.[16] The Commission found that the overlook would enable visitors to enjoy "the scenic vistas of the Hudson River"[17] and "will

16. Of the one hundred and forty acres to be acquired by Con Ed, over 100 acres is to be transferred to the Palisades Interstate Park Commission for recreation use.

17. This accords with the findings of the New England-New York Inter-Agency Committee, Report of the New England-New York Region, Subregion "E" (Hudson River Basin), 999(d) (reprinted as Sen. Doc. No. 14, 85th Congs. 1st Sess. (1957)) which recommended for the Hudson River Gorge ". . . establishment of a system of highway waysides . . . to make available, in a safe manner, the scenic vistas of the countryside."

not seriously or substantially impinge on the scenic historic or environmental qualities of the area."

The Commission heard extensive testimony on the effect of the project on historic sites in the area. There is no record that any event of historical significance took place at Cornwall or on Storm King Mountain. Constitution Island and West Point, and Forts Clinton and Montgomery, which are at Bear Mountain considerably below the project site, are the closest areas of historical importance. The project site is not visible from either Constitution Island or West Point. However, Constitution Island, which has the best preserved revolutionary fortification in the Highlands, will be visible from the proposed scenic overlook. None of the parties has offered any specific rebuttal to the Commission's conclusion that "the project will not cause the destruction of any historical site."[18]

The thrust of petitioner's arguments is that the principle of preservation of scenic beauty permits of no intrusion at all into this area and that, therefore, no power plant, no matter how innocuous, may be built. This is clearly a policy determination which, whatever may be our personal views, we do not have the power to impose on the Commission. The Commission has complied with

18. The propriety of the use by the Commission of the findings of the Advisory Council on Historic Preservation, set up by the Historic Preservation Act of 1966, 16 U. S. C. § 470 f (Supp. 1971), is the subject of some dispute. The Advisory Council found that plans for the project would have a "minimal adverse effect" on the scenic values of the area. Petitioner Scenic Hudson contends that the Council's finding is not only contrary to evidence but also that it ought not to be considered by the Commission because Scenic Hudson did not participate in the deliberations of the Council while the Commission's staff did. The Commission ruled that it had a statutory obligation to consider the report. We need not resolve this minor issue since the Commission stated that its "finding is made on the basis of record evidence, independent of consideration of the findings of the Advisory Council, which simply affirms our conclusion."

the terms of our remand by giving careful and thorough consideration to the impact of the project on the environment. The conclusions it has reached are supported by substantial evidence.

C. *The "fisheries question."*

In our remand order, in additional to requiring further consideration of the overall environmental impact of the project, we specifically directed the Commission to "take the whole fisheries question into consideration before deciding whether the Storm King Project is to be licensed." *Scenic Hudson*, *supra* at 624. We had in mind the allegations of fishermen's groups that the project threatened to destroy the eggs of the striped bass whose major spawning grounds, they maintained, are in the immediate vicinity of the project, and "that 'no screening device presently feasible would adequately protect these early stages of fish life' and that their loss would ultimately destroy the economically valuable fisheries." Id.

The Commission took official notice of the report of the Hudson River Policy Committee entitled "Hudson River Fisheries Investigations 1965 1968," which was based upon a study sponsored by the New York State Conservation Department and the United States Fish and Wildlife Service and conducted under the field direction of a technical advisor of the United States Bureau of Sport Fisheries.

The "Hudson River Fisheries Investigations" concluded that

> ". . . the evidence indicates that there would not be any significant adverse effects to the striped bass and American shad fisheries of the Hudson River from a pumped storage generating plant at Cornwall, New York."

The Policy Committee's study lends strong support to the views presented by a number of witnesses at the hearings to the effect that the spawning grounds of striped bass extend from locations at river mile 35 to river mile 123, and that these spawning grounds are, in the Commission's words, "not consistently more favorable in one location than another." The Commission found "that bass spawn substantially in the Hudson River over an 80 mile reach, including the Cornwall area, and that no part thereof is distinguished as a major spawning area."

The devices originally proposed to protect the fish have been redesigned to afford greater protection. Referring to the testimony of a fishery biologist from the Commission staff, the Commission said:

> ". . . that while the mortality rates of fish, fish eggs, and larvae inhabiting the water which will be drawn through the screen and the plant cannot be measured short of actual measurement during project operation, in his own opinion the losses to the fishery caused by the operation of the project would not significantly affect the Hudson River fishery resources."

In order to compensate for the loss of fish resulting from the operation of the proposed plant, Con Ed proposed, and the Commission approved, construction of a fish hatchery.

The Commission concluded:

"Witness Raney's fear[19] as to what might or could happen are counterbalanced by testimony based on

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[19] Scenic Hudson's witness, Raney, testified:

"Anything that man does is substantially opposed to nature. So if you build any sort of a structure you will have situations which are not found naturally in the environment so here you have an additional situation where you have fishes drawn up into an

sampling studies which relating egg producing capacity of the striped bass to volumes of water in plant operation indicates that the impact on Hudson fishery would not be substantial. Thus even if none of the fish and eggs at Cornwall survived, the total impact would be small. The evidence, however, is to the effect that no such disaster would befall the Cornwall segment. Eggs, larvae and fish entering the plant would have a survival rate in the area of 80 per cent. Further, hatchery operations elsewhere indicate the feasibility of an operation in the Hudson which would be capable of replacing any losses attributable to the project."

B. *The "aesthetic advantages of underground transmission lines against the economic disadvantages" and related routing problems.*

In compliance with our mandate, the Commission investigated the possibility of constructing the transmission lines of the project entirely underground. The Commission weighed the obvious aesthetic advantage of underground transmission as against its economic and functional disadvantages.

The evidence shows that putting the transmission lines underground would cost substantially more than having them overhead. The Commission's staff estimated that considering both construction and maintenance costs, underground lines would be approximately 16 times as expensive as overhead lines. The Commission explained that:

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artificial impoundment, eggs drawn up, larvae drawn up, possibly thirty species upon which they feed. So it is a very complicated business to try to evaluate the overall effect this will have. But basically the effect will be harmful to the fishes.

. . . . . .

I think anything that affects any substantial number of eggs, larvae, young or adult, could ultimately have a substantial effect on a fishery. But the degree of the effect I don't know."

"The relative costs of undergrounding can be appreciated from the fact that the problems inherent in transmitting power underground at high voltages are not simply a matter of putting an overhead transmission line, which is merely a bare insulated piece of metal conductor, into a trench. The phenomena of heat build-up and condenser (or capacitance) effect require that underground cables be an entirely different species of equipment."

The Commission cited a number of technological factors that result in higher labor and material costs for undergrounding. Underground cable requires a type of insulation which can be applied only by highly skilled labor. Transmission of power by underground lines presents problems which can be solved only by the installation of large magnet-type coils every 2 to 3 miles. Various other expensive techniques, such as intricate splicing, are needed to meet other problems presented by the electrical and thermal properties of underground lines.

The Commission found that there were functional disadvantages in underground cables. Although overhead lines have more outages, there can generally be immediate automatic reclosure with no disruption of service. Outages in underground cables, on the other hand, result in considerably greater disruption of service since the failure must be located, the damaged area excavated, and complicated repairs made.

The Commission, balancing the several factors which are involved, concluded:

"It is thus apparent that only for the most cogent reasons, as where no feasible alternative is possible or where the aesthetic detriment is so violent as to pre-

clude any consideration of overhead transmission facilities, that undergrounding should be required.

. . . . . .

Nor do we believe it is in the public interest to burden consumers with the cost of undergrounding cables unless it were necessary to prevent such destruction or serious damage."

The transmission route which is now approved is different from the route challenged before this court in 1965. The new route is not the route preferred by Con Ed, but is a modified route developed by the Commission staff. Although it is 5 to 6 miles longer than the route proposed by Con Ed, it would require 4 miles less of transmission corridor because it uses a greater length of the existing Pleasant Valley-Millwood corridor. The alternative route was selected because "it will impinge less on the area through which it passes than would any other route." The area traversed is "rough, wooded and hilly. More importantly, its valleys lie in a north-easterly direction and are oriented so as to provide the possibility of locating lines below crests." The wooded nature of the area will provide natural screening. The Commission found that "the area will remain what it is now—scenic and pleasant, with open farmland and orchards and partly wooded with some brooks. To say that this will be seriously damaged or destroyed by an overhead transmission line is not consistent with reality."[20]

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20. Con Ed is required by the license order to follow recognized guidelines for the construction of overhead transmission lines. Article 35(5) of the Commission's license order includes the guidelines contained in the Hudson Valley Power Commission's "Power Lines and Scenic Values in the Hudson River Valley." In addition, Con Ed is bound by the Commission's Order No. 414 which prescribes general regulations for the "protection and enhancement of aesthetic and related values in the design, location, construction, and operation of project works" (35 Fed. Reg. 18585 (1970)).

Since the Commission's conclusions on this issue are based upon consideration of all relevant factors and are supported by substantial evidence, they cannot be rejected.

E. *The Catskill Aqueduct.*

The issue of possible danger to New York City's Catskill Aqueduct was not involved in the earlier proceeding. It is presented in the new application because of the change in the Cornwall project to provide for construction of the powerhouse completely underground. As a consequence of that change the powerhouse is to be located at its closest point a distance of about 140 feet from the Moodna Pressure Tunnel, a link in the Catskill Aqueduct system. The Catskill system is one of three systems that supply New York City with substantially all of its water. Twenty-odd communities in upstate counties also have the right to, and do tap the Catskill Aqueduct.

The city contends that the Cornwell project interferes with its control of the Catskill Aqueduct and is therefore precluded by Section 27 of the Federal Power Act, 16 U. S. C. § 821 (1964), which provides that:

> "Nothing contained in this chapter shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein."

The argument based on Section 27 is without merit. The license that the Commission has issued does not authorize Con Ed to divert any of the city's water or to interfere with the tunnel. Moreover the "only purpose of Section 27 is to preserve to holders of state-conferred water rights a right to compensation if those rights are taken or destroyed

as an incident to the exercise by another, of a license granted by the Commission." *Portland General Electric Co. v. Federal Power Commission*, 328 F. 2d 165, 176, & no. 23 (9th Cir. 1964), citing *City of Fresno v. California*, 372 U. S. 627, 629-30 (1963) and *Ivanhoe Irrigation District v. McCracken*, 357 U. S. 275, 291 (1958), both of which involved the very similar language of Section 8 of the Reclamation Act of 1902, 43 U. S. C. § 383 (1964).[21] Section 27 was not intended to give the city the power to veto Commission action.

The Commission concluded that excavation of the powerhouse site would not cause damage to the Moodna Pressure Tunnel, that controlled blasting during construction would not endanger the Aqueduct and, generally, that "the probability of damage to the Aqueduct is remote." We think that there is substantial evidence in the record to support the Commission's determination.

The Commission found that the rock underlying the project "is a very large mass of dense uniform crystalline rock underlain by sedimental rock capable of sustaining great loads." The city contends that, on the contrary, instability of the rock at the Aqueduct site can be deduced from a failure of the original Moodna Tunnel in 1913 and by the phenomenon of "popping rock" encountered in construction of the tunnel. However, the evidence shows that the failure of the original Moodna Tunnel was due to excessive water pressure and insufficient rock cover. The tunnel was corrected by construction of an alternate shaft and has operated for a period of over 50 years without

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21. That statute provides:

"Nothing in sections . . . of this title shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested rights acquired thereunder. . . ." 43 U. S. C. § 383 (1964).

untoward incident. The Commission found that "[t]he phenomenon of 'popping rock' occurs in rock of this area only at depths below 1,000 feet," far below the depth proposed for the Cornwall project.

Although witnesses for the City testified that stress changes caused by the powerhouse excavation and by blasting might present hazards to the Aqueduct,[22] other witnesses seriously disputed these contentions. Smith, a consulting geologist for Con Ed, testified, as the Commission said, "that he could conceive of no possible condition in this area which would make the proposed plan hazardous from a geological point of view." Dr. Bartlett W. Paulding, Jr., Associate Professor and Acting Head of the Basic Engineering Department of the Colorado School of Mines, who was retained by Con Ed at the suggestion of the City, testified that the effect of excavation on the aqueduct would be insignificant. Dr. Paulding, whom the

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22. Torris Eide, consultant engineer to the Chief Engineer of the New York City Board of Water Supply testified that the removal of 254,000 cubic yards of rock might disturb the equilibrium in the forces within the rock formation, and thus present a risk to the Aqueduct. However, he had conducted no geologic or seismic tests of the area. Thomas Fluhr, engineering geologist and consultant to the New York City Board of Water Supply testified that the rock in the area appeared to be under stress. He stated "[t]he risk of failure of the aqueduct cannot be regarded as imminent but it represents a definite hazard." He conceded that the risk was small, but stated that "there certainly is some risk." He too had made no surveys beyond general mathematical studies. Malcolm T. Wane, Associate Professor of Mining and Engineering at Columbia University, testified for the city that he found that a vertical stress relief of 14% and a horizontal stress relief of 11% would result from excavation. He did not know what effect such changes would have since the present state of equilibrium of the Aqueduct was unknown. Don W. Deere, Professor in the Department of Civil Engineering and Geology at the University of Illinois, testified that there were too many unknowns to permit evaluation of stress changes. He believed that "there was a small but real risk involved to the present aqueduct because of the changes in stress and other activities associated with the construction of the project at this site."

Commission described as "a geologist and geophysicist specializing in rock mechanics," concluded, in the Commission's words

> "that the absence of adverse geological conditions, coupled with he results of a photoelastic analysis of the stress conditions around rectangular openings . . . indicate that the existing Catskill Aqueduct will not be endangered . . . during . . . excavation for the power plant."

Similar testimony was offered by Charles P. Benziger who based his conclusion on low stress conditions at the site as shown by seismic tests in drilled holes at the point where the power station is to be located.

The Commission's conclusion that blasting would pose at most a remote possibility of damage has ample support in the record. The city's own witness, Don V. Deere, testified that it was "possible, but unlikely that blasting, if restricted and properly controlled, will cause damage to the pressure tunnel." Another of the city's witnesses, Malcolm T. Wane, testified that the effects of blasting are somewhat conjectural. Con Ed's witness Paulding testified that the Aqueduct would not be endangered if blasting charges were limited to 55 pounds per charge. The Commission's conclusion that properly controlled blasting presented at most a "remote" danger is not seriously challenged by the city.

It is clear that the resolution of highly complex technological issues such as these was entrusted by Congress to the Commission and not to the courts. Where the Commission's conclusions are supported by substantial evidence, the courts must accept them. It seems to us that it would be very difficult indeed to argue that the evidence supporting the Commission's determination with

respect to the Aqueduct in insubstantial. In fact the argument presented to us on this issue appears to be either that some higher burden of proof should be imposed with respect to the matter or that the city should be able to exercise what, in effect, amounts to a veto power. However, there is no authority whatever to support the imposition of any greater burden of proof than that provided in the statutory standard and "[s]uch a veto power easily could destroy the effectiveness of the Federal Act. It would subordinate to the control of the [city] the 'comprehensive' planning which the Act provides shall depend upon the judgment of the Federal Power Commission or other representatives of the Federal Government." *First Iowa Hydro-Electric Cooperative v. Federal Power Commission*, 328 U. S. 152, 164 (1946) (footnote omitted).

III.

The only remaining concern is the allegation that the Commission failed to comply with certain statutory directives.

The first of these statutes is Section 10(a) of the Federal Power Act, 16 U. S. C. § 803(a) (1964 & Supp. 1971) which provides:

"§ 803. Conditions of license generally.

All licenses issued under sections 792, 793, 795-818, and 820-823 of this title shall be on the following conditions:

. . . .

(a) That the project adopted . . . shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of

interstate or foreign commerce, for the improvement and utilization of water-power development, and for other beneficial public uses, including recreational purposes; and if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval."

This is the statute upon which, to a large extent, our earlier remand was based. In our opinion we said that the phrase "recreational purposes" "undoubtedly encompasses the conservation of natural resources, the maintenance of natural beauty, and the preservation of historic sites." *Scenic Hudson*, *supra* at 614. We directed the Commission to consider all of these factors in reaching its decision.

It is obvious that in finding compliance with our remand order, we also find compliance with the statute on which that order was based. As we have pointed out, the Commission has given careful and thorough consideration to "recreational purposes," and, indeed, has used its "authority to require the modification of [the] project" in a number of aspects related to this end.

There is no real dispute as to other findings required by the statute. The Commission found that there would be no impediment to navigation, that use of the Hudson River for electric generation by this project is "well adapted to development of the waterway for the use or benefit of interstate or foreign commerce," and that the project will not interfere with any future program for the river since it will discharge no chemical, thermal or solid pollutants into the waterway. In short, the Commission has given full consideration to all of the statutory factors and has thus performed the "specific planning responsibility" entrusted to it by Congress in Section 10(a).

The petitioners also claim that the Commission has violated the National Environmental Policy Act, 42 U. S. C. §§ 4321 et seq. (Supp. 1971). This Act was passed after the close of the hearing, but before the Commission's decision.[23] Its applicability to this proceeding is clear, and is conceded. See *Zabel v. Tabb*, 430 F. 2d 199, 213 (5th Cir. 1970), *cert. denied*, 401 U. S. 910 (1971). Section 101 "recognizing . . . the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man" requires the federal government to

> "(b) . . . use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may—
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> . . . . .
>
> (4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;
>
> (5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities . . . . ." 42 U. S. C. § 4331 (Supp. 1971).

Section 102 of the Act, 42 U. S. C. § 4332 (Supp. 1971), requires agencies of the federal government to take certain prescribed measures.

The policy statement in Section 101 envisions the very type of full consideration and balancing of various factors which we, by our remand order, required the Commission to undertake. Like our remand, the Act does not require that a particular decision be reached but only

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23. The Act became effective January 1, 1970.

that all factors be fully explored. The eventual decision still remains the duty of the responsible agency.

The Commission has complied with the specific directives contained in Section 102 of the Act. The hearings reflected the "systematic, interdisciplinary approach" required by that section. The Commission consulted with other agencies, as required by Section 102, including the Chief of Engineers, the Advisory Council on Historic Preservation, the Department of the Interior, the Atomic Energy Commission and a number of state and local groups that stand to be affected. The environmental statement required by Section 102(2)(C) of the Act, 42 U. S. C. § 4332(2)(C) (1964), was submitted in the form of the Commission's opinion. In view of the exhaustive environmental findings which occupy a substantial portion of the Commission's opinion, and the Commission's explicit conformance with the enumerated portions of the required statement, we conclude that full compliance with the National Environmental Policy has been demonstrated.

IV.

We do not consider that the five years of additional investigation which followed our remand were spent in vain. The petitioners performed a valuable service in that earlier case, and later before the Commission. By reason of their efforts the Commission has reevaluated the entire Cornwall project. The modifications in the project reflect a heightened awareness of the conflict between utilitarian and aesthetic needs. Whether the project as it now stands represents a perfect balance of these needs is not for this court to decide. Since the Commission has fully performed the duties and responsibilities imposed upon it, it is our obligation to deny the petitions in all respects.

OAKES, *Circuit Judge* (dissenting):

If this case came to us without environmental overtones and with no threat to the water supply of the largest city in the United States, I would be constrained to take the viewpoint of the majority. For, whether or not I agreed with the weight given by the Federal Power Commission to alternative sources of power, such as the purchase of Canadian energy,[1] the court would be conclusively bound,

1. The FPC findings on the feasibility of purchasing, rather than creating, power are not entirely consistent. Finding 82 says in pertinent part:

> If the energy necessary to pump Cornwall comes from polluting power plants in New York City that would otherwise be idle, little or nothing would be gained in reducing the air pollution problem. Based on the assumption that Cornwall would go into operation in 1972 a Staff study introduced in evidence showed that by 1980 approximately 89 percent of its pumping requirement could be met by virtually non-polluting sources of generation. Cornwall, to the extent that its water is not pumped by power from Con Ed low cost nuclear plants will be powered primarily from sources in areas adjacent to the Con Ed service area, and perhaps by imported Canadian hydroelectric power.

Finding 134 says in pertinent part:

> Another considered alternative to the Cornwall development is the possibility of purchased power from Canada, namely from Churchill (Hamilton) Falls project, now under construction. To be a proper source of power supply, the energy from Canada would have to be taken substantially 24 hours per day; otherwise this would not be an economic source. The transmission distance involved and the relatively high cost of transmission facilities makes Churchill Falls power comparable to base load nuclear power or base load mine-mouth power or other sources of base load power outside of New York City, rather than an alternative to the Cornwall development. There is no indication when, if ever, Churchill Falls Power might be available to electric systems outside of Canada. In addition, there is no assurance that it would be available upon system separation.

It had been reported that on July 30, 1971, "dedication ceremonies" were held for a 345 KV transmission line linking the Canadian New Brunswick Power Commission with twelve investor-owned and two cooperative New England Utilities, with a power transfer capability of 600 megawatts. The intertie runs 230 miles southeast from Fredericton, New Brunswick, to Wiscasset, Maine. In its

both under Section 313(b) of the Federal Power Act, 16 U. S. C. § 825l(b), and the case law, *e.g., Gainesville Utilities Dep't v. Florida Power Corp.*, 91 S. Ct. 1592 (1971), by findings supported by "substantial evidence," particularly when the Commission is acting within its own field of "expertise and judgment" *Gainesville, supra*, 91 S. Ct. at 1598. It is also true, of course, that the courts cannot quarrel with the Congressional policy impliedly expressed in Sections 207 and 311 of the Federal Power Act, that puts great emphasis on "adequate service," 16 U. S. C. § 824f, the "cost of generation . . ." and "the development of navigation, industry, commerce, and the national defense," 16 U. S. C. § 825j.[2]

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first 25 days of operation it transmitted 58 [illegible] KWH of base-load and peaking energy. Other Canadian interconnections total about 2540 MW, including 2080 MW to New York and Michigan. See Public Power Weekly Newsletter (A. P. P. A.), Aug. 6, 1971, at 5. It is also interesting to note that on July 21, 1971, Senators Pastore and McGovern introduced S. 2324, a bill to establish "a national power grid system," the underlying concept of which was perhaps first advanced by the father of modern conservation, Governor Gifford Pinchot of Pennsylvania. In the course of Rhode Island Representative Forman's remarks on the companion House Bill (H. R. 9970), he said:

> Only with a national grid system can we assure all Americans an adequate and reliable supply of electric power. . . . An [illegible] example of how the national grid could accomplish this, consider the acute power shortage which struck New York City in 1969. Basin Electric Power Cooperative in North Dakota, along with the Bureau of Reclamation and Missouri Basin System wanted Consolidated Edison in New York to say that they would supply all of the power New York needed. The city remained dim, however, because there was no way to transmit the power from North Dakota to New York. Had a national grid existed, this power would have been readily available to the energy-starved area. 117 Cong. Rec. H7005 (daily ed. July 21, 1971).

[2] Section 207 of the Federal Power Act, 16 U. S. C. § 823, does not speak of conserving use of electrical energy, a policy which Consolidated Edison, the applicant here, is at least partially promoting with its 1971 "Save-A-Watt" advertising campaign. Nor does Section 311, 16 U. S. C. § 825j (dealing with the investigatory and information-gathering function of the FPC) in any way refer to

On the other hand, Congress has now placed a measure of responsibility with the FPC, and the other federal agencies, to take environmental factors into account.[3] The

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conservation of the environment. We are left with Congressional policy underlying the Federal Power Act that is read to assume that future electrical needs will increase and that the only way to meet them is to construct more and more generating capacity. This is an assumption that certainly bears re-examination [see P. Ehrlich & J. Holdren, "The Energy Crisis," Saturday Review, August 7, 1971, at 50], and one which automatically—in the present state of the generating art—involves a consumption of depletable natural resources (coal, oil, natural gas, uranium), an adverse impact of one sort or another on the environment, or both. The 1970 National Power Survey (FPC) Pt. II estimates annual "peak demands" for the metropolitan New York City power supply area at 7,350,000 Kilowatts in 1970, 13,360,000 in 1980 and 21,160,000 in 1990, *id.*, at II-1-8, and on this basis one could argue for perhaps three or four Storm King projects. The same report makes reference, *inter alia*, to the problems of air pollution from coal-fired plants, *id.*, at II-1-19; depletion of oil and gas reserves, *id.*, at II-1-19, 27; thermal pollution by nuclear plants, *id.*, at II-1-48; thermal discharges generally, *id.*, at II-1-49; ash disposal and nuclear fuel disposal, *id.*, at II-1-50. See also Sarvicki, "The National Power Crisis and Its Effect on Rural America," Rural Electrification, June 1971, at 15; M. Katz, "Decision-making in the Production of Power," Scientific American, Sept. 1971, at 191.

3 See Council on Environmental Quality, Environmental Quality—The Second Annual Report 25-26 (Aug. 1971). Sec. 102 of the National Environmental Policy Act of 1969 ("NEPA"), 42 U. S. C. §§ 4321-47, directs "all agencies of the Federal Government" to

> (A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision making which may have an impact on man's environment;
>
> (B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by title II of this Act, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decision-making along with economic and technical considerations;
>
> (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by Section 552 of title 5, United States Code, and shall accompany the proposal through the existing agency review processes;

(D) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources; 42 U. S. C. A. § 4332

The efficacy of this Act is in large part dependent on the decision in the instant case; as Schroeder points it in "Pollution in Perspective: A Survey of the Federal Effort and the Case Approach," Vol. IV, No. 2, Natural Resources Lawyer, 381, 419 (April 1971): "The key question ahead is whether, after balancing all pertinent considerations, an administrative decision is made that provides for less than full environmental protection—whether that decision will be upheld if challenged in the courts." It is interesting to note, although I place little significance on it here, that at a meeting of the Subcommittee on Environmental Quality Control of the ABA Committee on Environmental Quality, the Assistant to the Chairman of the FPC strenuously criticized NEPA, quoting a former AEC attorney who termed NEPA "an atrocious piece of legislation," calling it "woefully ambiguous," "an invitation to litigation," and expressing the hope that "reviewing courts will take a practical approach" and the fear that "to construe the statute as a rigid prescription of the quality or quantity of evidence required would quickly cripple the administrative process." Annex A, Minutes of Meeting 14, 19 (April 20, 1971). To what extent this genuinely reflects this agency's attitude toward NEPA, however, is doubtful; one might hope that Congressional concern with the U. S. environment might be given more respect by the Commission as a whole.

FPC also has its own duties, specified in Section 10(a) of the Federal Power Act, 16 U. S. C. § 803(a), to issue a license to use water power only when the project will be best adapted for "beneficial public uses, including recreational purposes." And indeed as Judge Learned Hand once put it, although in reference to agency interpretation of statutes:

> In spite of the plenitude of discussion in recent years as to how far courts must defer to the rulings of an administrative tribunal, it is doubtful whether in the end one can say more than that there comes a point at which the courts must form their own conclusions. Before doing so they will, of course,—like the administrative tribunals themselves—look for light from every quarter, and after all crannies have been searched, will yield to the administrative interpretation in all doubtful cases; but they can never abdicate. *Niagara Falls Power Co. v. FPC*, 137 F. 2d 787, 792 (2d Cir. 1943).

I take it also that we cannot abdicate when the Commission fails "to make findings or evaluate considerations relevant to its determination." *Gainesville Utilities Dep't v. Florida Power Corp.*, *supra*, 91 S. Ct. at 1598 n. 7; *and see Schaffer Transportation Co. v. United States*, 355 U. S. 83 (1957); *Scenic Hudson Preservation Conference v. FPC*, 354 F. 2d 608 (2d Cir. 1965), *cert. denied*, 384 U. S. 941 (1966). Similarly, if the agency findings are internally inconsistent, the court is not bound to accept them. *Ct. Gullick v. Baltimore & Ohio R. Co.*, 372 U. S. 108, 119 (1963); *Telex Corp. v. Balch*, 382 F. 2d 211, 215 (8th Cir. 1967); *Freightways, Inc. v. Stafford*, 217 F. 2d 831, 835 (8th Cir. 1955); *Williams v. United States*, 126 F. 2d 129, 132-33 (7th Cir.), *cert. denied*, 317 U. S. 655 (1942). Finally, while judicial deference to

administrative expertise is required, not every agency is expert in every aspect of science, technology, aesthetics or human behavior. *Cf. Universal Camera Corp. v. NLRB*, 340 U. S. 474, 476 (1951); see L. Jaffe, Judicial Control of Administrative Action 576 *et seq.* (1965). As Professor Jaffe has said, ". . . expertness is not a magic wand which can be indiscriminately waved over the corpus of an agency's findings to preserve them from review." Id. at 613; see also 4 K. Davis, Administrative Law Treatise § 30.07 (1958).

With these considerations in mind, I dissent. I dissent because I think the FPC acted arbitrarily, abusing its discretion while purporting to act under the mandate of this court in *Scenic Hudson*, *supra*; because its findings in respect to the Catskill Aqueduct are inconsistent and insufficient; because its findings as to the effect of the project upon New York City air pollution are incomplete and fail to take into account relevant factors; and because the Commission's findings and conclusions show that it has not really followed the mandates of the National Environmental Policy Act of 1969, Pub. L. 91-190 (Jan. 1, 1970), 42 U. S. C. § 4321-47.

The City of New York has pointed out, in opposition to the license granted by the FPC, that the Storm King (sometimes called "Cornwall") project powerhouse is proposed to be built only 140 feet from the Moodna Tunnel section of the Catskill Aqueduct. This aqueduct is one of three systems supplying water to New York City. It is a gravity-flow aqueduct over 50 years old, conveying approximately 40 per cent of the city's average daily water supply from the Ashokan Reservoir, 100 miles north of the city to the Kensico Reservoir, 15 miles north of the city line. Those who may remember the effects of severe droughts in the 1940's and the 1960's on the New York City water supply

must realize the importance of such a vast quantity of water to the city, and imagine the consequences of its disruption.[4]

The Moodna Pressure Tunnel begins at a downtake shaft some five miles westerly of the Hudson River, set in the rock of Storm King Mountain. Lined with concrete, it tunnels through the mountain at an elevation of minus 220 feet until it is 900 feet from the river; there it descends to an elevation of minus 616 feet to the river. From this point water continues to flow under pressure at 1100 feet below the Hudson River through the Hudson Pressure Tunnel and then connects to an uptake shaft on the east side of the River, surfacing at Breakneck Ridge. This whole complex of tunnels by which the Aqueduct crosses the Hudson is known as the Moodna Hudson-Breakneck Pressure Tunnel. It has had a continuous water flow since it broke down and was repaired in 1913;[5] consequently it has not been inspected since then. In a "pressure" tunnel, hydrostatic pressure is constantly maintained. The City, aware of the risk to its water supply from drilling, in its deed of Storm King land to the Palisades Interstate Park Commission, included a protective covenant to ban drilling within 200 feet of the Aqueduct.[6] When Consolidated Edison first proposed

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4. In addition to New York City, some twenty-four smaller communities tap into the Catskill Aqueduct. Any of those towns which rely on it exclusively for water would be perhaps more seriously endangered than the City by any damage to it.

5. After the completion of the Aqueduct in 1913 there was considerable leakage in the No. 7 downshaft leading to the Hudson Tunnel, apparently attributable to the combination of hydrostatic pressure and "relief of stress" in the rock surrounding the tunnel. The tunnel had to be "dewatered" and a new shaft (No. 7A) which bypassed the failed section was drilled to correct the situation.

6. WHEREAS, the Board of Estimate of the City of New York . . . authorized a grant and conveyance to the Palisades Interstate Park Commission, of the fee of the City-owned land hereinafter described . . .

in 1963 to build a powerhouse some 175 feet from the Aqueduct the City objected and in the original Consolidated Edison project turned down in *Scenic Hudson*, *supra*, the proposed powerhouse was moved some 400 feet to meet the City's objection.[7] At the hearings below the City presented two experienced engineers, Professor Malcolm T. Wane, with experience in mine design and rock mechanics and with mine failures due to stress conditions, and Dr. Don U. Deere, a professor of engineering and geology familiar with the major pump storage projects at Yard's Creek, Northfield Mountain and Churchill Falls. Dr. Deere concluded, on the basis that the Consolidated Edison excavation would cause an estimated 31 per cent increase in tangential stresses at the top and bottom of the tunnel and a decrease of 50 per cent on the sides, that there is "a small, but real" risk to the Aqueduct from the project. Dr. Deere pointed out that the degree of risk is unknown:

> Moreover, considering for the moment that the precise magnitude of the stress changes around the tunnel were accurately known, the effect of these stresses on stability of the tunnel lining and adjacent rock, i.e., the factor of safety, could still not be determined because neither the strength of the lining in its

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Subject to the following conditions, covenants and restrictions . . . :

> 1. The City of New York retains a permanent sub-surface easement to operate, maintain, and repair the Catskill Aqueduct which, at this location, is approximately 400 feet below the surface.
>
> . . .
>
> 5. Drilling of any kind is not permitted to depths greater than 200 feet below the present surface.

7. When Consolidated Edison came up with its presently proposed project the City rather slowly moved to intervene and the FPC reopened the proceedings to take evidence on this project. Presumably we should not penalize the City for its delay on this, an issue of mountainous importance.

present condition nor of the adjacent jointed and fractured rock mass is even approximately known. Deere, 124/18,577-78.*

He was joined in this conclusion by Dr. Wane:

> One of the outstanding features of the whole problem is a lack of specific knowledge of what exists at this site . . . [since] we do not know anything about the state of nature in the immediate neighborhood of the aqueduct. Wane, 124/18,550-51.

Consolidated Edison's chief witness, Dr. Bartlett Paulding, a geologist who had done no work on tunnels or underground excavations, testified that on the basis of a "photo-elastic" technique his estimate of radial stress changes around the Aqueduct resulting from the powerhouse excavation would come to only 11 per cent, and that this meant that the excavation would not significantly affect the existing Aqueduct. Paulding, 112 17,203. Professor Wane significantly indicated that the photo-elastic method, while sound as far as it goes, only accounts for the unloading or vertical effect of excavation, not for the horizontal effects.

I do not take it that there is any particular FPC expertise in geology, and particularly the effect of unloading, that is, relief of rock stress by excavation, on pressure aqueduct tunnels. In answer to a question on oral argument along this line, the FPC assured the court that its staff had some knowledge and expertise. If this be so, one may wonder why the commission did not follow the recommendations of its staff that "an appropriate precautionary meas-

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* References are to volume/page number of the transcript of the hearings.

ure should be undertaken by the Applicant to safeguard the Moodna Tunnel Section of the Catskill Aqueduct."[8]

Several of the commission's own "findings" on the danger to the Aqueduct tend to support the City's position and not the applicant's, and most of the commission's findings on the Aqueduct are couched in terms of uncertainty. For example, in Finding 270 reference is made to the city's witness Fluhr and mention is made of his testimony that "there is certainly some risk," but the commission never tells us what this risk is or indeed whether the commission finds any risk. Again, Finding 271 refers to the former leaking of the aqueduct necessitating its closing down during construction in 1913 and goes on to say, "any large open joints connecting the bypass[9] and aqueduct could be grouted off if the experience of the original construction is typical." The commission, however, does not tell us whether it is likely that "the experience of the original construction" will be "typical" or just how this grouting would be accomplished. Indeed, one surmises that to accomplish any grouting the Aqueduct would have to be shut down, and that this might impair the integrity of the Aqueduct.

The Findings fail to convince me that there is no substantial risk to the Aqueduct. Finding 272 says that the operation of the Aqueduct for over fifty years indicates that it can withstand all of the hydrostatic pressures and stresses involved in the construction at Cornwall. But how such operation can establish this is not indicated, since even

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8. See Commission Staff Brief on Exceptions to Initial Supplemental Decision, February 12, 1970, at 11. The City itself takes the position that either to construct a by-pass of the Moodna Tunnel section of the Aqueduct or to line that section with steel would require an extensive shutdown of the Aqueduct with "a resultant risk to the integrity of the aqueduct."

9. By "by-pass" here it is unclear whether the Commission was referring to the tunnel from the reservoir to the power station.

on the Consolidated Edison evidence there will be new and changed stresses resulting from drilling and blasting for the powerhouse excavation.

In Finding 284 the commission states that "[t]he evidence, thus, reasonably is to the effect that the probability of damage by reason of blasting is *remote*" (italics supplied). But Footnote 25 to Finding 287 says "[t]here is no evidence concerning the condition of the Aqueduct's lining. Its structural integrity is unknown to the city or any of its witnesses."

The mere recitation of testimony by the Federal Power Commission does not amount to the making of findings.[10] The comment above in Footnote 25 to Finding 287 is revealing, moreover, in that it seems to imply that there is some duty on the part of the City to make a substantial showing that the Aqueduct will break. If the structural integrity is unknown to the City or any of its witnesses, presumably it is also unknown to the commission and to Consolidated Edison's witnesses. The burden is not on the City to prove that the Aqueduct will not break, but on the applicant to prove and the commission to find no danger to public "life, health and property."[11] The com-

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10. *Cf. Schneiderman v. United States*, 320 U. S. 118, 129-31 (1943); *Kelley v. Everglades Drainage District*, 319 U. S. 415, 422 (1943); *Brown Paper Mill Co. v. Irvin*, 134 F. 2d 337, 338 (8th Cir. 1943).

11. "Further, the project must be safe so as not to endanger life, health and property." Commissioner Ross, dissenting in *Consolidated Edison Co. of New York, Inc.* (FPC March 1965), *rev'd in Scenic Hudson Preservation Conf. v. FPC*, 354 F. 2d 608 (2d Cir. 1965), *cert. denied*, 384 U. S. 941 (1966). See also Section 10(c) of the Federal Power Act, 16 U. S. C. § 803(c), requiring a licensee to "conform to such rules and regulations as the Commission may from time to time prescribe for the protection of life, health and property," and rendering the licensee liable "for all damages occasioned to the property of others by the construction . . . of the project works. . . ."

mission's reliance in its Footnote to Finding 287 on trouble-free operation for fifty years under entirely different circumstances seems to me insufficient to support the required finding of safety.

Finding 290 contains the conclusion "that the evidence in the record indicates that the probability of damage to the aqueduct is remote and that a by-pass is not required." Even if this in and of itself be supported by the evidence, Finding 295 that "construction of the powerhouse will not endanger the aqueduct" is inconsistent with it and not based on the evidence: there is a world of difference between *no* danger and a "remote" danger. If a danger is "remote" the degree of "remoteness" assumes importance in proportion to the magnitude of the danger. Here the danger is obviously great, and there is no finding as to the degree of remoteness.

The commission's Added Findings 33 and 34 are not based upon the earlier findings and in turn are not based on the evidence when they say (1) that the construction will not constitute a hazard to the aqueduct and (2) that the site does not constitute a hazard to the aqueduct.

The most compelling statement in the record evaluating the problem is that of City's witness Thomas W. Flint, an engineering geologist who is a consultant for the City of New York Board of Water Supply:

> The geologic risk is that during construction of the project or during construction of the proposed bypass, stresses already present in the rock may be triggered and cause failure of the aqueduct. Moreover, even if the bypass were successfully constructed and placed in operation, and the pump-generator and transformer galleries also completed, there would be no assurance that orogenic stresses would not build up and cause

failure of the aqueduct even after a lapse of many years.

. . .

The risk of failure of the aqueduct cannot be regarded as imminent but it represents a definite hazard. When the Moodna Tunnel was first constructed and failed, ample time was available to rebuild it since there were no consumers dependent on it for water supply. At present there is no substitute for the Catskill Aqueduct; its failure could have catastrophic consequences.

Evaluation of the risk involved in constructing the power plant near the aqueduct tunnel cannot be made on an actuarial basis. The risk might be taken as a calculated business risk if only money were involved; however, a failure of this water supply system might jeopardize the lives and welfare of millions of persons in the city and the upstate communities served by the Catskill Aqueduct. Fluhr, 110 16,837-38.[12]

On this record and on the commission's findings and in the light of the commission's own staff recommendation, I would dissent as to the Storm King site even if the aqueduct were the only factor involved. But there are other points on which it seems to me the commission was only paying lip service to the mandate of this court in *Scenic Hudson*, *supra*.

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12. Mr. Fluhr was originally engaged by the consultants to Consolidated Edison Co. and later by Consolidated Edison directly, with the understanding that the interests of the City of New York would take priority. He thought the original surface plant proposed in *Scenic Hudson*, *supra*, safe and "geologically sound."

The first of these is air pollution.[13] While the extent to which the FPC possesses any particular expertise on air pollution may be doubted, we may assume some familiarity with the subject in the light of the commission's comments in, and experience in preparing, the 1970 National Power Survey.[14] Unfortunately, one generating plant after another has been constructed in the past without much attention to this problem[15]—one that by contrast is perhaps more readily visible for a visitor to New York than it may be to full-time citizens of the city.[16] The Cornwall project as an alternative to other generating methods on its face is more conducive to eliminating air pollution, except for one catch: *in order to pump water from the river to the reservoir at Cornwall*, Consolidated Edison may, as the commission order now recalls, pollute

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13 "Air is our most vital resource, and its pollution is our most serious environmental problem." President Nixon's Message to Congress, reported in 21 BNA Environmental Reporter 1813, 1814 (Feb. 19, 1971).

14 See pt. II, at II-261 et seq.

15 "Industries, power plants, furnaces, automobiles, these and other so-called 'ordinary' sources add enormous amounts to the pollution of the air. In highly industrialized areas, such pollutants can literally make breathing hazardous to health, and even under the most favorable meteorological conditions they are a problem." President Nixon's Message to Congress, 21 BNA Environment Reporter 1813, 1814 (Feb. 19, 1971).

16 New York City is subject to pollutants emitted in both gaseous and particulate form from a wide variety of sources including power generating plants. Finding 72.

It should be noted that severe air pollution episodes resulting from inversion have occurred in New York City in 1953, 1963, and 1966. An "inversion" occurs when a little or no wind moves a layer of cold air creates a layer of warm air to prevent it from rising. Without an upward current of air to which the pollutants cannot be dispersed. As a result, the pollutants trapped in a thickening stagnant cloud above the area affected and then drifted down to the ground line. While inversions are not very frequent, they can last for several days and can be present day and night. A typical episode, in which an accumulation [illegible] occurred during the Thanksgiving holiday, November 22 to 26, 1966. Finding 70.

the city during pumping hours, which are usually at night,[17] when the air is most still and the pollutants sit low over the city. In other words, there is no requirement that Consolidated Edison refrain from using its present generating facilities for pumping purposes; most of those facilities are, according to the commission's Finding 82, relatively inefficient and burn relatively expensive, depletable fossil fuels, and some of them are outmoded.[18]

Since by FPC calculations it will take 1.4 KWH of pumping energy supplied during non-peak periods to produce 1 KWH of project energy, Finding 71, it is obvious that additional air pollution will result if the pumping energy comes from those old fossil fuel plants.[19] If, as

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17 By utilizing energy surplus to system needs during nighttime and weekends, or purchasing low cost surplus energy from interconnected systems, Cornwall is designed to convert low cost surplus energy into high value energy during periods of peak demand. Finding 70.

18 Consolidated Edison's eleven steam electric plants contributed in 1969 84 percent of the sulphur dioxides and 9.1 percent of the fly ash and other "particulate matter" that is so evident to the senses of sight and smell in New York City skies.

The United States Public Health Service estimates that in 1969 approximately 440,000 tons of sulphur dioxide and approximately 75,000 tons of "particulate matter" were emitted in New York City. Of that total, Con Ed's eleven steam electric plants accounted for approximately 150,000 tons of sulphur dioxide and approximately 6,800 tons of fly ash and other particulates, primarily from the combustion of bituminous coal and residual oil for the generation of electricity. Although Con Ed's emissions are far less than they were a few years ago, and are expected to be even less with the planned elimination by 1972 of coal and a further reduction in sulphur content of residual oil, Con Ed is likely to continue to be a substantial contributor to air pollution in the City so long as fossil fuel generating facilities comprise the greater part of its system. Finding 77 (emphasis supplied).

19 If the energy necessary to pump Cornwall comes from polluting power plants in New York City that would otherwise be idle, little or nothing would be gained in reducing the air pollution problem. Based on the assumption that Cornwall would go into operation in 1972 a Staff study introduced in evidence showed that by

Finding 83 says, "[v]ery little city generated power will be used to pump Cornwall, particularly as Con Ed's interconnections and nuclear generated capacity increase with time," why would it not be proper to order that only the most efficient and least polluting fossil fuel generating units be utilized for pumping purposes now?[20] Indeed, Finding 84[21] seems to suggest that gas plants will be used for pumping but the order does not require their use. Of

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1980 approximately 80 percent of its pumping requirement could be met by virtually nonpolluting sources of generation. Cornwall, to the extent that its water is not pumped by power from Con Ed low cost nuclear plants will be powered primarily from sources in areas adjacent to the Con Ed service area, and perhaps by imported Canadian hydroelectric power. Finding 82.

20. The FPC argues this is impractical, because electrical energy "flows through a system like Con Edison's in a unitary fashion." But surely the Commission's great expertise in transmission matters can come into play here. Experience must have shown what the minimum safe loading parameters are for night-time base load plants to assure the necessary system stability and to provide the necessary load service; operation above such limits, with possible exceptions for emergency situations, could be prohibited as a condition to the license.

21. Assuming it is initially necessary to utilize some City generated power for pumping purposes it is unrealistic to suggest that the fossil fuel generating units which would be so utilized would not be the most efficient that the system has. The evidence is that the more efficient fossil fuel units, even at the 1.4 to 1 ratio, will utilize less fossil fuel per megawatt hour of generation for pumping off peak hours than would be used by the less efficient units which, absent Cornwall, would have to be utilized to meet peak loads. To the degree that Con Ed does use City-generated power to pump water at Cornwall, which may occur to some extent during the first few years of the hydro project's operation, the record indicates that the type of fossil fuel used for the most part will probably be clean burning natural gas. During at least some parts of the year, Con Ed does not now, and probably will not, have enough natural gas available to generate sufficient power by gas turbines, steam generators, or otherwide [sic] to meet peak demand; it seems clear, however, that very substantial amounts of gas will be available for power generation during the night-time hours, even during the peak of the heating season. To the extent that this gas-generated power is not needed to meet the City's night base load, it may be used to pump Cornwall. Finding 84.

course, it may be that Consolidated Edison will be prohibited from using its old fossil fuel plants for pumping or otherwise under the Clean Air Amendments of 1970[22] to the Clean Air Act, 42 U. S. C. §§ 1857-1957*l*. But this does not absolve the FPC of its responsibilities to avoid adding to air pollution under its own governing Act or under NEPA, *supra* note 3. Consolidated Edison's own studies made in 1966-67 show that Storm King will result in more fossil fuel usage in New York City than would certain other alternatives. While this study has been questioned by the FPC itself, one of the justifications made by the company for the Storm King plant has been that it would permit otherwise idle large base-load plants in the city to generate at night.

> Our customers' demands for electricity are high when they are awake and at work. Conversely, during the night time when most are sleeping, their need for electricity is at a low level—much below the capability of our most modern and efficient generating capacity. We plan to use this otherwise idle but efficient capacity to pump and store water in the upper reservoir at time of light customer demand. 32/4191.

Beyond this, we are told that Consolidated Edison generating facilities in the City produced 113,700 tons of nitrogen oxides, constituting about 38 per cent of total emissions of those compounds in the City.[23] Yet there is

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22. Pub. L. 91-604, 84 Stat. 1676 [see especially new Sec. 111(d)], 1 U. S. Code Cong. & Adm. News, 91st Cong., 2d Sess. 1964 (1970).

23. See City Petition for Rehearing p. 19 (R. 270, 694). Nitrogen dioxide, one of the oxides, is apparently a component of smog, very injurious to the respiratory system; the City's Department of Air Resources estimates that nitrogen dioxide levels of 0.01 ppm (4 hr. average) for more than three days are dangerous to health, and levels of 0.05 ppm (4 hr. average) promote smog formations.

no mention of these in the Commission findings, except perhaps by implication in Finding 76.[24] To my mind, remand is required not only on the strength of the present record and *Scenic Hudson*, *supra*, for insufficiency of findings, but also in view of the changes which have occurred in Congressional policy on air pollution control,[25] and in plans to eliminate air pollution in New York City.[26] It is no answer to say that the City may invoke its own police power, if necessary, to regulate the dispersions from Consolidated Edison fossil fuel plants; Consolidated Edison would be the first to cite, indeed it already relies upon, *First Iowa Hydroelectric Coop. v. FPC*, 328 U. S. 152 (1946), to avoid undue inhibition of its rights under any license granted for Storm King.

The final matters which, to my mind, tip the scales for a reversal rather than simply a reversal and remand are two. The first concerns what may broadly be called aesthetics,[27] impairment by the project of the mountain's

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Those levels are already exceeded in the city. With the thought that operation of the city-located plants will be in the relatively still night-time air, one has visions of economical and efficient pumping at Storm King while New Yorkers cough and gasp for breath.

24. The Commission's brief argues from the testimony of EPA witness Longaker that "the use of sulfur oxide served as a more important 'parameter or index of pollution from large stationary sources' than particulate emissions," as if to tell the court that the index of nitrogen oxide emission is unimportant. I take it that "particulate emissions" consist of fly ash, grit and solid matter, and may or may not include nitrogen oxides.

25. See note 22 *supra*.

26. The City argues, in its petition for rehearing filed September 18, 1970, that Consolidated Edison's 800 MW plant at Astoria additionally burdens city air above acceptable federal levels with both sulphur and nitrogen oxides, as well as particulates.

27. "It is not to be forgotten that the mountain we are talking about is 'unique,' 'a mountain which would be left alone . . . [and which is] awesome . . . monumental . . . .'" to quote some of the testimony duly recited in Commission Findings 143 and 145.

scenic grandeur. The commission's Finding 148 refers to the mountain "swallow[ing]" the "scar of the highway, the intrusive railroad structure and fills and tolerat[ing] both the barges and scows which pass by it and the thoughtless humans [sic] who visit it without seeing it . . . ." The finding goes on to say that just as the mountain swallows present day intrusions, "it will swallow the structures which will serve the needs of people for electric power." This argument borders on the outrageous; it can be used to justify every intrusion on nature from strip mining to ocean oil spills, *viz.*, "the Santa Barbara coastline already has an ocean-side highway, numerous offshore oil rigs, and a lot of flotsam and jetsam comes on to the beaches, etc. . . ." Two scenic wrongs do not necessarily make a right. On the basis of the commission's thesis, wherever you have one billboard you can put two, wherever you have one overhead transmission line you can put another, you can add blight to blight to blight. That a responsible federal agency should advance that proposition in the form of a finding and in the teeth of the NEPA seems to me shocking. The commission's finding overlooks the fact that we are considering here a power station which above ground will consist of a concrete tailrace with abutments 32 feet high and 685 feet long, cutting back existing shore line from 195 to 260 feet,[28] exclusive of any access road.[29] This location, as the commission concedes, is on a small riverbottom foothill which "is visually a part of Storm King Mountain . . . ."[30] The mountain may "swallow" the project, but the concrete tailrace and abutments, as long as a good-sized football stadium—over an eighth of a

28. Finding 191.

29. Finding 189.

30. Finding 156.

mile and three stories high, will surely be stuck in its craw.

The second point which tips the scales for reversal, I believe, is the commission's treatment of environmental impact, a treatment required under the National Environmental Policy Act of 1969 ("NEPA").[31] This Act requires "all agencies" to "include in every recommendation or report on . . . other major Federal actions significantly affecting the quality of the human environment, a detailed statement" on:

> (i) the environmental impact of the proposed action,
>
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
>
> (iii) alternatives to the proposed action,
>
> (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long term productivity, and
>
> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented. Section 102(c), 42 U. S. C. A. § 4332(2)(C)(i)-(v).

In a very real sense this Act is a legislative response to and embodiment of the far-sighted and significant *Scenic Hudson* decision of this court[32] where the commission was directed in Judge Hays' words to "include as a basic con-

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31. Pub. L. 91-190, 83 Stat. 852, 42 U. S. C. A. §§ 4321-47, eff. Jan. 1, 1970.

32. "Scenic Hudson, by placing a positive responsibility on the FPC to consider less environmentally damaging alternatives, laid a foundation for the obligation to develop alternatives imposed by NEPA." Council on Environmental Quality—The Second Annual Report 160 (Aug. 1971).

cern the preservation of natural beauty." 354 F. 2d at 624, and to give proper consideration to "the totality of a project's long-range effects." Id. at 620.

The commission properly included a series of eight findings (¶¶211-18) purportedly dealing with NEPA, even though the record had closed before the Act became effective. In measuring those findings (and other findings) against the Act, to determine whether they constitute the detailed statement the Act requires, it seems to me we must bear in mind some of the declared goals of NEPA:

> In order to carry out the policy set forth in this chapter, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may—
>
> (1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;
>
> (2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;
>
> (3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences . . . . 42 U. S. C. A. § 4331(b)(1)-(3).

As recently pointed out by the Court of Appeals for the District of Columbia, "the very purpose of NEPA was to tell federal agencies that environmental protection is as much a part of their responsibility as is protection and promotion of the industries they regulate. Whether or not the spectre of a national power crisis is as real as the commis-

sion apparently believes, it must not be used to create a blackout of environmental considerations in the agency review process." *Calvert Cliffs' Coordinating Committee, Inc. v. AEC*, 40 U. S. L. W. 2067 (D. C. Cir., July 23, 1971).[33]

Here the commission's Finding 217 says, incomprehensibly, "[a]ny short term adverse impact on the natural environment is more than offset by the enhancement of long term productivity which will result from the project". This is supposed to be a commission finding under NEPA, but I think the finding indicates that the commission did not read the Act very carefully. Section 102(2)(C)(iv), 42 U. S. C. A. 4332, requires a statement of "the relationship between local short term *uses* of man's environment and the maintenance and enhancement of long term productivity" (emphasis supplied). Not the short-term *impact* on the natural environment, but the short term *uses* of it in relation to long term productivity, is the statement required. Here we are considering permanent structures, a long-term and substantial use of an area of great natural beauty, "unique beauty," in the words of *Scenic Hudson, supra*, 354 F. 2d at 613, involving an "irreversible and irretrievable commitment of resources" in the proposed project if licensed, to use the language of Section 102(C)(v) of NEPA.

Finding 213 says that "there is essentially no conflict concerning alternative uses of available resources because with the exception of the small part of the Black Rock Forest to be flooded by the reservoir practically none of the other parts of the project preclude alternative uses of available resources." This finding, as the brief of the Scenic Hudson Preservation Conference suggests, com-

33. The Court was of course speaking of the AEC, but the language of the opinion is equally applicable to the FPC.

pletely omits the conflicting alternative use of preserving the area free from any utility installations, tailraces, abutments and access roads.

In Finding 215, the commission concludes under NEPA, and the majority opinion here relies upon the finding, that none of the most likely proposed alternatives "could be sited within one hundred miles of New York City with any less physical impact on the environmental aspects of the affected area than the Cornwall project." In this day of high voltage transmission, what is so magic about one hundred miles?[34] Are all areas within one hundred miles of New York City to be treated alike for electric generating purposes? Or are they all to be made to look alike, so that we will no longer have to be concerned how they are treated?

Finding 217 says "[t]he resources which will be committed to this project are the acreage it will necessarily encompass and the fuel resources which will be committed to pumping energy" which are "many times over" outweighed by "the electric energy resources which will be generated by the commitment of such resources." But this Finding overlooks both points mentioned earlier in this dissent, the risk to the Aqueduct and the increase, however temporary, of air pollution in the City to generate pumping power. To view plant siting at Storm King Mountain as only a commitment of "acreage,"[35] rather than as a com-

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34 See, *e.g.*, note 1 *supra*.

35 See also Finding 188

". . . Limiting the external features at the powerhouse site to the portal entrance tailrace, and access road, totalling approximately 3 or 4 acres, out of Storm King's total of over 400 acres should reduce to a minimum the visual impact on the scenic vistas of Storm King Mountain or the Highland Gorge of the Hudson River and thereby preclude any material scenic impairment or detriment.

See also Commission Brief p. 50.

ainment of a scenic wilderness area—albeit with some past intrusions and some present fairly easily rehabilitatable defacements—to a massive, if partially hidden, power structure, is to beg the question of environmental preservation.

The extent to which the commission has in this proceeding too readily rubber-stamped Consolidated Edison's plans is indicated by its authorization of an alternative project within Palisades Interstate Park. The commission overruled its own examiner in this regard and the choice of an alternative site flies in the teeth of the Park Compact that the lands included within the Park "shall be used only for public park purposes." 50 Stat. 719, Section 3.

It would seem that the specific authority of Congress is needed for the development, transmission or utilization of power within the limits of a national park. See 16 U. S. C. § 797(a).[36] *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U. S. 402, 413 (1971), speaks of "the few green havens that are public parks," albeit in another connection. I would protect those "few green havens." See *Scenic Hudson, supra*, quoting former Federal Power Commissioner Ross:

> [I]t appears obvious that had this area of the "Hudson Highlands" been declared a State or National park, that is, had the people in the area already spoken, we probably would have listened and might well have refused to license it. 345 F. 2d at 614-15.

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36. . . . [N]o permit, license, lease, or authorization for dams, conduits, reservoirs, power houses, transmission lines, or other works for storage or carriage of water, or for the development, transmission or utilization of power within the limits . . . of any national park or monument shall be granted or made without specific authority of Congress.

Congressional approval of the Palisades Interstate Park Compact by resolution on August 19, 1937 (50 Stat. 719) would seem to raise the Compact to the status of federal legislation. *Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U. S. 275, 278 (1959); *Delaware River Joint Toll Bridge Comm'n v. Colburn*, 310 U. S. 419, 427 (1940).

This being the second opportunity the commission has had to follow the mandate of this court, and it having failed to do so as I suggest above, I would conclude, as did then Circuit Judge Burger in an FCC case, "that it will serve no useful purpose to ask the Commission to reconsider the Examiner's actions and its own Decision and Order . . . ." *Office of Communication of the United Church of Christ v. FCC*, 425 F. 2d 543, 550 (D. C. Cir. 1969). I would therefore reverse, without a remand.

1965 OPINION.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Before: LUMBARD, *Chief Judge*,
WATERMAN and HAYS, *Circuit Judges*.

Petition, pursuant to Section 313(b) of the Federal Power Act, 16 U. S. C. § 825l(b), to review and set aside certain orders of the Federal Power Commission granting intervenor a license to construct a pumped storage hydroelectric project.

Orders set aside and case remanded for further proceedings in accordance with this opinion.

HAYS, *Circuit Judge*:

In this proceeding the petitioners are the Scenic Hudson Preservation Conference, an unincorporated association consisting of a number of non-profit, conservationist organizations, and the Towns of Cortlandt, Putnam Valley and Yorktown. Petitioners ask us, pursuant to § 313(b) of the Federal Power Act, 16 U. S. C. § 825l(b), to set aside three orders of the respondent, the Federal Power Commission:[1]

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1. At oral argument petitioners moved [illegible] record to be taken in the application [illegible] Trial Examiner of the Federal Power Commission on May 1965. These hearings were limited to cross-examination of the [illegible] and the effects of [illegible] Petitioners allege that the May hearings disclose information which should have been developed and considered by the Commission at the time the license was granted. We are not being asked to review the Examiner's findings, nor to [illegible] the Commission's determination of the questions presented at the May hearings, but rather to consider whether the May hearings are a convenient source of information from which inferences can be drawn about the completeness of the March record. For this limited purpose we have granted petitioners' motion.

(a) An order of March 9, 1965 granting a license to the intervener, the Consolidated Edison Company of New York, Inc., to construct a pumped storage hydroelectric project on the west side of the Hudson River at Storm King Mountain in Cornwall, New York;

(b) An order of May 6, 1965 denying petitioners' application for a rehearing of the March 9 order, and for the reopening of the proceeding to permit the introduction of additional evidence;

(c) An order of May 6, 1965 denying joint motions filed by the petitioners to expand the scope of supplemental hearings to include consideration of the practicality and cost of underground transmission lines, and of the feasibility of *any* type of fish protection device.

A pumped storage plant generates electric energy for use during peak load periods,[2] using hydroelectric units driven by water from a headwater pool or reservoir.[3] The contemplated Storm King project would be the largest of its kind in the world. Consolidated Edison has estimated its cost, including transmission facilities at $162,000,000. The project would consist of three major components, a storage reservoir, a powerhouse, and transmission lines. The storage reservoir,[3] located over a thousand feet above the powerhouse, is to be connected to the powerhouse,

2. Capacity for peak load periods is that part of a system's generating equipment which is operated intermittently for short periods during the hours of highest daily, weekly, or seasonal kilowatt demand.

3. The project's reservoir would contain a surface area of 240 acres and a usable capacity of 25,000 acre-feet. A part of the space which it would occupy is now occupied by a reservoir providing part of the water supply for the Village of Cornwall. Another area consisting of approximately 70 acres of property within the Black Rock Forest, a private forest reserve of Harvard University, would also be inundated by the proposed reservoir. Consolidated Edison has offered appropriate compensation for the acreage which would be used.

located on the river front, by a tunnel 40 feet in diameter. The powerhouse, which is both a pumping and generating station, would be 800 feet long and contain eight pump generators.[4]

Transmission lines would run under the Hudson to the east bank and the underground for 1.6 miles to a switching station which Consolidated Edison would build at Nelsonville in the Town of Philipstown. Thereafter, overhead transmission lines would be placed on towers 100 to 150 feet high and these would require a path up to 125 feet wide[5] through Westchester and Putnam Counties for a distance of some 25 miles until they reached Consolidated Edison's main connections with New York City.[6]

During slack periods Consolidated Edison's conventional steam plants in New York City would provide electric power for the pumps at Storm King to force water up the mountain, through the tunnel, and into the upper reservoir. In peak periods water would be released to rush down the mountain and power the generators. Three kilowatts of power generated in New York City would be necessary to obtain two kilowatts from the Cornwall installation. When pumping the powerhouse would draw approximately 1,080,000 cubic feet of water per minute from the Hudson, and when generating would discharge up to 1,620,000 cubic feet of water per minute into the river. The installation would have a capacity of 2,000,000 kilowatts, but would be so constructed as to be capable of enlargement to a total of 3,000,000 kilowatts. The water in the upper reservoir may

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4 According to plans presented to the Federal Power Commission three pumping generator units would be installed and go into operation in mid-1967 and the remaining five in 1968.

5 However, the path might be even wider at corners, transposition points, cross points, or points of an unusual character.

6 As has already been noted we are not now concerned with the order of October 4, 1965 in which the Commission established the exact route of the transmission lines and the width of the right-of-way.

be regarded as the equivalent of stored electric energy; in effect, Consolidated Edison wishes to create a huge storage battery at Cornwall. See Federal Power Commission, *National Power Survey* 120-21 (1964).

The Storm King project has aroused grave concern among conservationist groups, adversely affected municipalities and various state and federal legislative units and administrative agencies.[2]

To be licensed by the Commission a prospective project must meet the statutory test of being "best adapted to a comprehensive plan for improving or developing a waterway". Federal Power Act § 10(a), 16 U. S. C. § 803(a). In framing the issue before it, the Federal Power Commission properly noted:

> "[W]e must compare the Cornwall project with any alternatives that are available. If on this record Con Edison has available an alternative source for meeting its power needs which is better adapted to the development of the Hudson River for all beneficial uses, in-

[2] For bills introduced in Congress for the purpose of preserving the Hudson River and adjacent areas see House Introduction No. H. R. 3012, 3018; Senate Introduction No. S. 1380. Hearings were held on May 10 and 11, 1965 before the House of Representatives Subcommittee on Fisheries and Wildlife Conservation. House of Representatives, 89th Cong., 1st Sess., on Hudson River Sporting Groups.

The New York Joint Legislative Committee on Natural Resources held hearings on November 19 and 20, 1964. See Preliminary Report of the Joint Legislative Committee on Natural Resources, *On the Hudson River Valley and the Consolidated Edison Company Storm King Mountain Project* (issued February 16, 1965) (hereinafter cited "*Preliminary Report*").

The Fish and Wildlife Service of the Department of the Interior and the New York State Conservation Department have expressed concern about the effect of the project on the fish life of the Hudson. See Part IV *infra*.

Numerous conservationist groups have interests themselves in the project, and many of them filed formal petitions to intervene before the Commission.

cluding scenic beauty, this application should be denied."

If the Commission is properly to discharge its duty in this regard, the record on which it bases its determination must be complete. The petitioners and the public at large have a right to demand this completeness. It is our view, and we find, that the Commission has failed to compile a record which is sufficient to support its decision. The Commission has ignored certain relevant factors and failed to make a thorough study of possible alternatives to the Storm King project. While the courts have no authority to concern themselves with the policies of the Commission, it is their duty to see to it that the Commission's decisions receive that careful consideration which the statute contemplates. See *Michigan Consolidated Gas Co. v. Federal Power Comm'n*, 283 F. 2d 204, 226 (D. C. Cir.), cert. denied, 364 U. S. 913 (1960). Petitioners' application, pursuant to § 313(b), 16 U. S. C. § 825*l*(b), to adduce additional evidence is granted.[8] We set aside the three orders of the Commission to which the petition is addressed and remand the case for further proceedings in accordance with this opinion.

I.

The Storm King project is to be located in an area of unique beauty and major historical significance. The highlands and gorge of the Hudson offer one of the finest pieces of river scenery in the world. The great German traveler Baedeker called it "finer than the Rhine." Petitioners' contention that the Commission must take these factors into consideration in evaluating the Storm King project is justified by the history of the Federal Power Act.

8. The hearings to which the third order refers have already been held; however, the relief petitioners seek is provided by our determination as to the second order.

The Federal Water Power Act of 1920, 41 Stat. 1063 (1920) (now Federal Power Act, 16 U. S. C. §§ 791a et seq.), was the outgrowth of a widely supported effort on the part of conservationists to secure the enactment of a complete scheme of national regulation which would promote the comprehensive development of the nation's water resources. *See Federal Power Comm'n v. Union Electric Co.*, 381 U. S. 90, 98-99 (1965); *First Iowa Hydro-Electric Coop. v. Federal Power Comm'n*, 328 U. S. 152, 180 (1946). See generally Cushman, *The Independent Regulatory Commission*, 275-283 (1941); Pinchot, *The Long Struggle for Effective Federal Water Power Legislation*, 14 Geo. Wash. L. Rev. 9 (1945).[9] It "was passed for the purpose of developing

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9. The Supreme Court has noted that:

"The movement toward the enactment of the Act in 1920 may be said to have taken its keynote from President Roosevelt's veto of a bill which would have turned over to private interests important power sites on the Rainy River." *Federal Power Comm'n v. Union Electric Co.*, 381 U. S. 90, 98-99 n. 11 (1965).

President Roosevelt's veto message read:

"We are now at the beginning of great development in water power. Its use through electrical transmission is entering more and more largely into every element of the daily life of the people. Already the evils of monopoly are becoming manifest; already the experience of the past shows the necessity of caution in making unrestricted grants of this great power." 42 Cong. Rec. 4698 (1908).

See also President Roosevelt's veto of the James River bill, H. R. 17767, 60th Cong., 2d Sess. (1909), veto message, 43 Cong. Rec. 978 (1909); President Roosevelt's letter appointing the Inland Waterways Commission, 42 Cong. 6968 (1908), which read in part:

"Works designed to control our waterways have thus far usually been undertaken for a single purpose, such as the improvement of navigation, the development of power, the irrigation of arid lands, the protection of lowlands from floods, or to supply water for domestic and manufacturing purposes. While the rights of the people to those and similar uses of water must be respected, the time has come for merging local projects and uses of the inland waters in a comprehensive plan designed for the benefit of the entire country. Such a plan should consider and include all the

and preserving to the people the water power resources of the country." *United States ex rel. Chapman v. Federal Power Comm'n*, 191 F. 2d 796, 800 (4th Cir. 1951), aff'd, 345 U. S. 153 (1953).

Congress gave the Federal Power Commission sweeping authority and a specific planning responsibility. *First Iowa Hydro-Electric Coop. v. Federal Power Comm'n*, 328 U. S. 152, 180-81 (1946) ("instead of the piecemeal, restrictive, negative approach of the River and Harbor Acts and other federal laws previously enacted"); *National Hells Canyon Ass'n v. Federal Power Comm'n*, 237 F. 2d 777 (D. C. Cir. 1956), cert. denied, 353 U. S. 924, rehearing denied, 353 U. S. 978 (1957).

Section 10(a) of the Federal Power Act, 16 U. S. C. 803(a), reads:

> "§ 803. Conditions of license generally.
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> All licenses issued under sections 792, 793, 795-818, and 820-823 of this title shall be on the following conditions:
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> . . . .
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> (a) That the project adopted, . . . shall be such as in the judgment of the Commission *will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, and for other beneficial public use, including recreational purposes;* and if necessary in order to secure such plan the Commission shall have authority to require the

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uses to which streams may be put, and should bring together and coordinate the points of view of all users of waters.

* * * * *

"[The plans of the Commission should be formulated] in the light of the widest acknowledge of the country and the people, and from the most diverse points of view."

modification of any project and of the plans and specifications of the project works before approval." (Emphasis added.)

"Recreational purposes" are expressly included among the beneficial public uses to which the statute refers. The phrase undoubtedly encompasses the conservation of natural resources, the maintenance of natural beauty, and the preservation of historic sites.[10] See *Namekagon Hydro Co. v. Federal Power Comm'n*, 216 F. 2d 509, 511-12 (7th Cir. 1954). All of these "beneficial uses," the Supreme Court has observed, "while unregulated, might well be contradictory rather than harmonious." *Federal Power Comm'n v. Union Electric Co.*, 381 U. S. 90, 98 (1965). In licensing a project, it is the duty of the Federal Power Commission properly to weigh each factor.

In recent years the Commission has placed increasing emphasis on the right of the public to "out-door recreational resources." 1965 F. P. C. Report 69. Regulations issued in 1963, for the first time, required the inclusion of a recreation plan as part of a license application. F. P. C. Order No. 260-A, amending § 4.41 of Regulations under Federal Power Act, issued April 18, 1963, 29 F. P. C. 777, 28 Fed. Reg. 4092. The Commission has recognized generally that members of the public have rights in our recreational, historic and scenic resources under the Federal Power Act. *Namekagon Hydro Co.*, 12 F. P. C. 203, 206 (1954) ("the Commission realizes that in many cases where

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10. The clear intention of Congress to emphasize "recreational purposes" is indicated by the fact that subsection (a) was amended in 1935 by substituting the present language "plan for improving or developing . . . including recreational purposes" for "scheme of improvement and utilization for the purpose of navigation, of water-power development, and of other beneficial public uses." Senate Rep. No. 621, 74th Cong., 1st Sess., page 45 stated that the amendment was intended to add "an express provision that the Commission may include consideration of recreational purposes."

unique and most special types of recreation are encountered a dollar evaluation is inadequate as the public interest must be considered and it cannot be evaluated adequately only in dollars and cents"). In affirming *Namekagon* the Seventh Circuit upheld the Commission's denial of a license, to an otherwise economically feasible project, because fishing, canoeing and the scenic attraction of a "beautiful stretch of water" were threatened. *Namekagon-Hydro Co. v. Federal Power Comm'n*, 216 F. 2d 509, 511-12 (7th Cir. 1954).

Commissioner Ross said in his dissent in the present case: "[I]t appears obvious that had this area of the 'Hudson Highlands' been declared a State or National park, that is, had the people in the area already spoken, we probably would have listened and might well have refused to license it."

II.

Respondent argues that "petitioners do not have standing to obtain review" because they "make no claim of any personal economic injury resulting from the Commission's action."

Section 313(b) of the Federal Power Act, 16 U. S. C. § 825*l*(b) reads:

> "(b) Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States court of appeals for any circuit wherein the licensee or public utility to which the order relates is located. . . ."

The Commission takes a narrow view of the meaning of "aggrieved party" under the Act. The Supreme Court has observed that the law of standing is a "complicated specialty of federal jurisdiction, the solution of whose prob-

lems is in any event more or less determined by the specific circumstances of individual situations. . . ." *United States ex rel. Chapman v. Federal Power Comm'n*, 345 U. S. 153, 156 (1953). Although a "case" or "controversy" which is otherwise lacking cannot be created by statute, a statute may create new interests or rights and thus give standing to one who would otherwise be barred by the lack of a "case" or "controversy." The "case" or "controversy" requirement of Article III § 2 of the Constitution does not require that an "aggrieved" or "adversely affected" party have a personal economic interest. See *State of Washington Dept. of Game v. Federal Power Comm'n*, 207 F. 2d 391 (9th Cir. 1953), cert. denied, 347 U. S. 936 (1954); *Reade v. Ewing*, 205 F. 2d 630 (2d Cir. 1953); cf. *Scripps-Howard Radio, Inc. v. Federal Communications Comm'n*, 316 U. S. 4 (1942); *Federal Communications Comm'n v. Sanders Bros. Radio Station*, 309 U. S. 470 (1940); *International Union v. Underwood Corp.*, 219 F. 2d 100, 103 (2d Cir. 1955); *Associated Industries, Inc. v. Ickes*, 134 F. 2d 694 (2d Cir.), vacated as moot, 320 U. S. 707 (1943); Jaffe, *Standing to Secure Judicial Review: Private Actions*, 75 HARV. L. REV. 255 (1961). Even in cases involving original standing to sue, the Supreme Court has not made economic injury a prerequisite where the plaintiffs have shown a direct personal interest. See, e.g., *Abington School District v. Schempp*, 374 U. S. 203 (1963); *Engle v. Vitale*, 370 U. S. 421 (1962); *Zorach v. Clauson*, 343 U. S. 306 (1952).

In *State of Washington Dept. of Game v. Federal Power Comm'n*, 207 F. 2d 391, 395 n. 11 (9th Cir. 1953), cert. denied, 347 U. S. 936 (1954), the Washington State Sportsmen's Council, Inc., a non-profit organization of residents, the State of Washington, Department of Game, and the State of Washington, Department of Fisheries, opposed the construction of a dam because it threatened to

destroy fish. The Federal Power Commission granted the license; the interveners applied for a rehearing which the Commission denied. Petitioners asked for review under § 313(b) and the court upheld their standing, noting:

> "All are 'parties aggrieved' since they claim that the Cowlitz Project will destroy fish in [sic] which they, among others, are interested in protecting."

The Federal Power Act seeks to protect non-economic as well as economic interests.[11] Indeed, the Commission recognized this in framing the issue in this very case:

> "The project is to be physically located in a general area of our nation steeped in the hisotry of the American Revolution and of the colonial period. It is also a general area of great scenic beauty. The principal issue which must be decided is whether the project's effect on the scenic, historical and recreational values of the area such that we should deny the application."

In order to insure that the Federal Power Commission will adequately protect the public interest in the aesthetic, conservational, and recreational aspects of power development, those who by their activities and conduct have exhibited a special interest in such areas, must be held to be included in the class of "aggrieved" parties under § 313(b). We hold that the Federal Power Act gives petitioners a legal right to protect their special interests. See *State of Washington Dept. of Game v. Federal Power Comm'n. supra.*

At an earlier point in these proceedings the Commission apparently accepted this view. Consolidated Edison strongly objected to the petitioners' standing, but the Commission did not deny their right to file an application for

11. See discussion in Part I, *supra.*

a rehearing under § 313(a) of the Act which also speaks in terms of "aggrieved parties."[12]

Moreover, petitioners have sufficient economic interest to establish their standing. The New York-New Jersey Trail Conference, one of the two conservation groups that organized Scenic Hudson, has some seventeen miles of trailways in the area of Storm King Mountain. Portions of these trails would be inundated by the construction of the project's reservoir.

The primary transmission lines are an integral part of the Storm King project. See Federal Power Act § 311, 16 U. S. C. § 796(11).[13] The towns that are co-petitioners with Scenic Hudson have standing because the transmission lines would cause a decrease in the proprietary value of publicly held land, reduce tax revenues collected from privately held land, and significantly interfere with long-range community planning. See *City of Pittsburgh v. Federal Power Comm'n*, 237 F. 2d 741, 748 (D. C. Cir. 1956).

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12. Federal Power Act § 313(a), 16 U. S. C. 825*l*(a) reads: "§ 825*l*. Rehearing; court review of orders

(a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order."

13. Federal Power Act § 3(11), 16 U. S. C. § 796(11) reads: "'[P]*roject' means complete unit of improvement* or development, *consisting of* a power house, all water conduits, all dams and appurtenant works and structures (including navigation structures) which are a part of said unit, and all storage, diverting, or forebay reservoirs directly connected therewith, *the primary line or lines transmitting power therefrom to the point of junction with the distribution system or with the interconnected primary transmission system*, all miscellaneous structures used and useful in connection with said unit or any part thereof, and all water-rights, rights-of-way, ditches, dams, reservoirs, lands, or interest in lands the use and occupancy of which are necessary or appropriate in the maintenance and operation of such unit." (Emphasis added.)

Yorktown, for example, fears that the transmission lines would run over municipal land selected for a school site, greatly decreasing its value and interfering with school construction. Putnam Valley faces similar interference with local planning and a substantial decrease in land tax revenues.[14]

We see no justification for the Commission's fear that our determination will encourage "literally thousands" to intervene and seek review in future proceedings. We rejected a similar contention in *Associated Industries, Inc. v. Ickes*, 134 F. 2d 694, 707 (2d Cir.), vacated as moot, 320 U. S. 707 (1943), noting that "no such horrendous possibilities" exist. Our experience with public actions confirms the view that the expense and vexation of legal proceedings is not lightly undertaken.

In any case, the Federal Power Act creates no absolute right of intervention; § 308(a), 16 U. S. C. § 825g(a), reads:

> "In any proceeding before it, the Commission, in accordance with such rules and regulations as it may prescribe, may admit as a party any interested State, State commission, municipality, or any representative of interested consumers or security holders, or any competitor of a party to such proceeding, or any other person whose participation in the proceeding may be in the public interest."

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14. Permitting the Commission, for reasons of convenience and practicality, to limit the licensing proceeding and to hold for later determination the route of transmission lines, does not divest the petitioning towns of their standing. If we accepted the Commission's contrary argument we would be required to withdraw from the towns their right to challenge the entire integrated project.

Although the order of October 4, 1965 is not before us for review, we note that the Commission has conceded in its Supplemental Brief that Putnam Valley is in the same position as before the order and that the transmission route chosen "might be sufficient to cause aggrievement" to petitioner, Yorktown.

Since the right to seek review under §§ 313(a) and (b) is limited to a "party" to the Commission proceeding, the Commission has ample authority reasonably to limit those eligible to intervene or to seek review. See *Alston Coal Co. v. Federal Power Comm'n*, 137 F. 2d 740, 742 (10th Cir. 1943). Representation of common interests by an organization such as Scenic Hudson serves to limit the number of those who might otherwise apply for intervention and serves to expedite the administrative process.

III.

The Federal Power Act § 313(b), 16 U. S. C. § 825*l*(b), reads in part:

> "(b) If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper."

The Commission in its opinion recognized that in connection with granting a license to Consolidated Edison it "must compare the Cornwall project with any alternatives that are available." There is no doubt that the Commission is under a statutory duty to give full consideration to alternative plans. See *Michigan Consolidated Gas Co. v. Federal Power Comm'n*, 283 F. 2d 204, 224-226 (D. C. Cir.), cert. denied, 364 U. S. 913 (1960); *City of Pittsburgh v. Federal Power Comm'n*, 237 F. 2d 741 (D. C. Cir. 1956).

In *City of Pittsburgh*, three months after the hearings were closed, the petitioners attempted to present to the Commission memoranda supporting an alternative sugges-

tion. The District of Columbia Circuit set aside the Commission's order and remanded the case with directions to reopen the record. It found that the Commission had improperly rejected as "untimely" evidence concerning the proposed alternative. The court stated that:

> "The existence of a more desirable alternative is one of the factors which enters into a determination of whether a particular proposal would serve the public convenience and necessity. That the Commission has no authority to command the alternative does not mean that it cannot reject the [original] proposal." *City of Pittsburgh v. Federal Power Comm'n*, 237 F. 2d 741, 751 n. 28 (D. C. Cir. 1956).

In the present case, the Commission heard oral argument on November 17, 1964, on the various exceptions to the Examiner's report. On January 7, 1965 the testimony of Mr. Alexander Lurkis, as to the feasibility of an alternative to the project, the use of gas turbines, was offered to the Commission by Hilltop Cooperative of Queens, a taxpayer and consumer group. The petition to intervene and present this new evidence was rejected on January 13, 1965 as not "timely." It was more than two months after the offer of this testimony, on March 9, 1965, that the Commission issued a license to Consolidated Edison. When Mr. Lurkis's testimony was subsequently reoffered by the petitioners on April 8, 1965, it was rejected because it represented "at best" a "disagreement between experts." On the other hand, we have found in the record no meaningful evidence which contradicts the proffered testimony supporting the gas turbine alternative.

Mr. Lurkis is a consulting engineer of thirty-nine years experience. He has served as Chief Engineer of the New York City Bureau of Gas and Electric, in charge of a

staff of 400, and as Senior Engineer of the New York City Transit Authority, where he supervised the design and construction of power plants.[15] The New York Joint Legislative Committee on Natural Resources,[16] after holding hearings on the Storm King project on November 19 and 20, 1964, summarized Mr. Lurkis's testimony as follows:

> "Mr. Alexander Lurkis . . . presented a detailed proposal for using gas turbines. This, he claimed, would meet the alleged peaking need of Con Ed and result in a saving for its customers of $132,000,000. The Committee has learned that similar gas turbine installations are now in use or proposed for use by a number of progressive electric utilities throughout the nation. In addition to meeting the alleged peak power needs and saving money for the ratepayer, the gas turbines proposed by Mr. Lurkis would have the following advantages:
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> 1) Permit the company greater flexibility in meeting the power needs of its service area. Admittedly, technological developments in power production are changing and improving this field at such a rapid rate that it may well be entirely revolutionized in 10 to 15 years. There are obvious advantages in the gas turbine installations. Small installations can be added as needed to meet demand. This, in contrast to a single, giant, permanent installation such as Con Ed proposes at Storm King Mountain, which would tie the tech-

15. Mr. Lurkis has made numerous studies of utility adequacy including a survey of "blackouts" in New York during 1959 and 1961, which resulted in revisions of the Consolidated Edison system. He is a member of many professional associations and has published numerous articles and presented many papers on electrical engineering subjects.

16. A total of 107 witnesses were heard; the large majority objected to the project.

nology and investment of one company to a method of power production that might be obsolete in a few years.

2) Keep the power production facilities within New York City. This would not only avoid the desecration of the Hudson Gorge and Highlands, but, also, would eliminate the great swathe of destruction down through Putnam and Westchester Counties and their beautiful suburban communities." *Preliminary Report* at 6.

The Committee report, issued on February 16, 1965, three weeks before the license to Consolidated Edison was granted, concluded:

"[T]he whole situation involved in the Consolidated Edison Storm King Mountain project, and the protection of the Hudson River and its shores, requires further and extensive study and investigation.

. . .

This Committee goes on record as opposing Con Ed's application until there has been adequate study of the points indicated in this report." *Preliminary Report* at 8.

Mr. Lurkis's analysis was based on an intensive study of the Consolidated Edison system, and of its peaking needs projected year by year over a fifteen year period. He was prepared to make an economic comparison of a gas turbine system (including capital and fuel operating costs) and the Storm King pumped storage plant. Moreover, he was prepared to answer Consolidated Edison's objections to gas turbines by indicating:

(1) that gas turbines could meet Consolidated Edison's reserve needs;

(2) that the blackouts of 1959 and 1961 were caused by breakdowns in distribution, not by a lack of power;

(3) that gas turbines would avoid the hazards of weather damage to high transmission lines involved in the Storm King project;

(4) that since 3 kilowatts of power must be generated by steam plants in New York City in order to get 2 kilowatts of power from the Storm King project, gas turbines would be even more useful than the project in reducing air pollution;

(5) that noise from the turbines would be at acceptable industrial levels.

Other benefits envisioned from gas turbines were higher reliability, increased system flexibility, and possible savings in transmission line investment.[17]

Aside from self-serving general statements by officials of Consolidated Edison, the only testimony in the record bearing on the gas turbine alternative was offered by Ellery R. Fosdick. Fosdick's hastily prepared presentation considered turbines driven by steam and liquid fuel as well as gas; his direct testimony occupied less than ten pages of the record.[18] Fosdick's testimony was too scanty to meet.

17. Citing *Federal Power Comm'n v. Transcontinental Gas Corp.*, 365 U. S. 1 (1961) the Commission asserts that "serious policy questions" would be raised by the use of gas, for the generation of electrical energy. But the serious questions alluded to do not excuse the Commission's failure to develop and hear pertinent evidence on the alternative. As to the use of gas, the Supreme Court held in *Transcontinental* that "a flexible balancing process, in the course of which all factors are weighed prior to final determination," is needed in each case. *Id.* at 23.

18. Fosdick conceded that he had no firsthand knowledge of the Consolidated Edison system or its requirements. He had been unable to make a study of the economics of alternative methods of generating peaking power, nor had he made an examination of New York City power needs. His testimony on air pollution, which was favorable to Consolidated Edison, was addressed to a question on the "burning of kerosene" and not of natural gas, a non-pollutant.

the requirement of a full consideration of alternatives. Indeed, under the circumstances, we must conclude that there was no significant attempt to develop evidence as to the gas turbine alternative; at least, there is no such evidence in the record.

The Commission argues that petitioners made "no attempt to secure additional testimony." Yet the record indicates that more than two months before the license was granted the Commission summarily rejected the offer of Mr. Lurkis's testimony.

It is not our present function to evaluate this evidence. Our focus is upon the action of the Commission. The fact that Lurkis's testimony was originally offered by a non-petitioner, Hilltop Cooperative, is irrelevant. A party acting as a "private attorney general" can raise issues that are not personal to it. See *Associated Industries, Inc. v. Ickes*, 134 F. 2d 694, 705 (2d Cir.), vacated as moot, 320 U. S. 707 (1943); Jaffe, *Standing to Secure Judicial Review: Private Actions*, 75 Harv. L. Rev. 255, 283 (1961) ("the right to attack an order resting on a record made by others, or no record at all, could be valuable").

Especially in a case of this type, where public interest and concern is so great, the Commission's refusal to receive the Lurkis testimony, as well as proffered information on fish protection devices and underground transmission facilities,[19] exhibits a disregard of the statute and of judicial mandates instructing the Commission to probe all feasible alternatives. *Michigan Consolidated Gas Co. v. Federal Power Comm'n*, 283 F. 2d 204, 224, 226 (D. C. Cir.), cert. denied, 364 U. S. 913 (1960); *City of Pittsburgh v. Federal Power Comm'n*, 237 F. 2d 741 (D. C. Cir. 1956).

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19. See Part IV *infra*.

IV.

The Federal Power Commission argues that having intervened "petitioners cannot impose an affirmative burden on the Commission." But, as we have pointed out, Congress gave the Federal Power Commission a specific planning responsibility. See Federal Power Act § 10(a), 16 U. S. C. 803(a). The totality of a project's immediate and long-range effects, and not merely the engineering and navigation aspects, are to be considered in a licensing proceeding. As Commissioner Ross said in his dissent:

> "I do feel the public is entitled to know on the record that no stone has been left unturned. How much better it would be if the public is clearly advised under oath and cross examination that there truly is no alternative? The thread running through this case has been that the applicant is entitled to a license upon making a prima facie case. My own personal regulatory philosophy compels me to reject this approach. This Commission of its own motion should always seek to insure that a full and adequate record is presented to it. A regulatory commission can insure continuing confidence in its decisions only when it has used its staff and its own expertise in manner not possible for the uninformed and poorly financed public. With our intimate knowledge of other systems and to a lesser extent of their plans, it should be possible to resolve all doubts as to alternative sources. This may have been done but the record doesn't speak. Let it do so."

In this case, as in many others, the Commission has claimed to be the representative of the public interest. This role does not permit it to act as an umpire blandly calling balls and strikes for adversaries appearing before

it; the right of the public must receive active and affirmative protection at the hands of the Commission.

This court cannot and should not attempt to substitute its judgment for that of the Commission. But we must decide whether the Commission has correctly discharged its duties, including the proper fulfillment of its planning function in deciding that the "licensing of the project would be in the overall public interest." The Commission must see to it that the record is complete. The Commission has an affirmative duty to inquire into and consider all relevant facts. See *Michigan Consolidated Gas Co. v. Federal Power Comm'n*, 283 F. 2d 204, 224, 226 (D. C. Cir.), cert. denied, 364 U. S. 913 (1960); *Isbrandtsen Co. v. United States*, 96 F. Supp. 883, 892 (S. D. N. Y. 1951), aff'd by an equally divided court, 342 U. S. 950 (1952); Friendly, *The Federal Administrative Agencies*, 144 (1962); Landis, *The Administrative Process*, 36-46 (1938); cf. *City of Pittsburgh v. Federal Power Comm'n*, 237 F. 2d 741 (D. C. Cir. 1956).

In *Michigan Consolidated Gas Co. v. Federal Power Comm'n, supra* at 224, the Court of Appeals of the District of Columbia, in criticizing the Federal Power Commission for refusing to consider an alternative and for failing to take the initiative in seeking information, observed:

> "Even assuming that under the Commission's rules Panhandle's rejection of the settlement rendered the proposal ineffective *as a settlement*, it could not, and we believe should not, have precluded the Commission from considering the proposal *on its merits*. Indeed, *the proposal appears prima facie to have merit enough to have required the Commission at some stage of the proceeding to consider it on its own initiative as an alternative to total abandonment.*" (Emphasis added.)

On rehearing the court added:

> "In viewing the public interest, the Commission's vision is not to be limited to the horizons of the private parties to the proceeding.
>
> Where, as here, a regulatory agency has ignored factors which are relevant to the public interest, the scope of judicial review is sufficiently broad to order their consideration. These limits are not to be confused with the narrower ones governing review of an agency's conclusions reached upon proper consideration of the relevant factors." *Id.* at 226.

Judge Frank, in response to a submission to the one made here, said:

> "This is a somewhat surprising contention, to be contrasted with the following views of Commissioner Aitchison of the Interstate Commerce Commission concerning the obligations of administrative agencies: '. . . The agency does not do its duty when it merely decides upon a poor or nonrepresentative record. As the sole representative of the public, which is a third party in these proceedings, the agency owes the duty to investigate all the pertinent facts, and to see that they are adduced when the parties have not put them in. . . . The agency must always act upon the record made, and if that is not sufficient, it should see the record is supplemented before it acts. It must always preserve the elements of fair play, but it is not fair play for it to create an injustice, instead of remedying one, by omitting to inform itself and by acting ignorantly when intelligent action is possible. . . .'"

Isbrandtsen Co. v. United States, 96 F. Supp. 883, 892 (S. D. N. Y. 1951), affirmed by an equally divided court, 342 U. S. 950 (1952).

And Dean Landis said:

> "For [the administrative] process to be successful in a particular field, it is imperative that controversies be decided as 'rightly' as possible, independently of the formal record the parties themselves produce. The ultimate test of the administrative is the policy that it formulates; not the fairness as between the parties of the disposition of a controversy on a record of their own making." Landis, *The Administrative Process* 39 (1938).

In addition to the Commission's failure to receive or develop evidence concerning the gas turbine alternative, there are other instances where the Commission should have acted affirmatively in order to make a complete record.

The Commission neither investigated the use of interconnected power as a possible alternative to the Storm King project, nor required Consolidated Edison to supply such information. The record sets forth Consolidated Edison's interconnection with a vast network of other utilities, but the Commission dismissed this alternative by noting that "Con Edison is relying fully upon such interconnections in estimating its future available capacity." However, only ten pages later in its opinion the Commission conceded:

> "Of significant importance, in our opinion, is the absence in the record, or the inadequacy, of information in regard to Con Edison's future interconnection plans; it[s] plans, if any, for upgrading existing transmission lines to higher voltages; and of its existing transmission line grid in this general area and its future plans."

Moreover, in its October 4, 1965 order, the Commission in explaining how Consolidated Edison would be able to

send "substantial amounts" of Storm King power to upstate New York and New England power companies, each December, said:

> "ample spinning reserve would be available during the winter from the interconnected companies in New Jersey and Pennsylvania, including the 'mine-mouth' plants. Thus, even at times of the greatest diversion of Cornwall power, Con Edison would have other power sources immediately available to it for its peak requirements."

If interconnecting power can replace the Storm King project in December, why was it not considered as a permanent alternative?

Commissioner Ross in his dissent said:

> "In my opinion, the only true alternative that would likely be as economic as the proposed project would be purchased peaking power. There are two possibly differing sources; one would be purchasing pumped storage or normal hydro peaking which may be in the process of development in New England; or secondly, purchasing steam peaking power from new large scale thermal stations in Pennsylvania or in Appalachia."

There is no evidence in the record to indicate that either the Commission or Consolidated Edison ever seriously considered this alternative.[39] Nor is there any evidence that

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39. At page 39 of the record Mr. W. L. Waring, senior vice-president of Consolidated Edison, described the inter-connection system but failed to answer the question: "Would this not be an economical substitute for the pumped storage project?" In later testimony to a similar question responded: "Yes, [other sources of power] are available, but not in sufficient quantity."

But there was no evidence introduced as to the amount of power available.

a combination of devices, for example, gas turbine and interconnections, were considered. Indeed, the Commission stated in its brief that it is "of doubtful relevance to the present case whether there are practical alternatives to an appropriate use of water power by which Con Ed could meet its anticipated needs for peaking power with generally comparable economy." The failure of the Commission to inform itself of these alternatives cannot be reconciled with its planning responsibility under the Federal Power Act.

In its March 9 opinion the Commission postponed a decision on the transmission route to be chosen until the May 1965 hearings were completed. Inquiry into the cost of putting lines underground was precluded because the May hearings were limited to the question of overhead transmission routes. The petitioners' April 26, 1965 motion to enlarge the scope of the May hearing was denied. The Commission insisted that the question of underground costs had been "extensively considered." We find almost nothing in the record to support this statement.[21]

Consolidated Edison estimated the cost of underground transmission at seven to twelve times that of overhead

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21. The Commission contends that petitioners failed to raise the issue of underground transmission line costs and the bearing of these costs on the licensing of the project, in their Application for Rehearing. But in listing Commission errors, petitioners said:

> "finally it excluded from the consideration of . . . where to put the transmission lines the deeper questions of . . . what the cost would be of putting additional portions of the transmission lines underground."

The Philipstown Citizens Association, in its Application for Rehearing, specifically urged that the "Commission committed error in excluding further consideration of underground transmission at the remand hearing which started on May 4, 1965."

As we said earlier, the petitioners may raise issues which are not personal to them.

lines.[22] These estimates were questioned by the Commission's own staff, which pointed out that Consolidated Edison's estimates incorrectly assumed that the underground route would be the same as the overhead; in fact, an underground route along the New York Central right-of-way would be clearly less costly than the estimate, since there are no large differences of elevation requiring special pumping facilities and no new cross-country right-of-way would be necessary. Moreover, the staff noted that the estimates were based on Consolidated Edison's experience in New York, where excavation and other costs are higher. The Examiner noted the staff's reservations in his opinion, but since no alternative figures had been presented, he accepted those submitted by Consolidated Edison, as did the Commission.[23]

Consolidated Edison witnesses testified that the Storm King project would result in annual savings of $12,000,000 over a steam plant of equivalent capacity. Given these savings, the Commission should at least have inquired into the capital and annual cost of running segments of the transmission line underground in those areas where the overhead structures would cause the most serious scenic damage. We find no indication that the Commission seriously weighed the aesthetic advantages of underground transmission lines against the economic disadvantages.[24]

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22. Compare Federal Power Commission, *National Power Survey* 156 (1964). ("Efforts are frequently made to require utilities to place transmission circuits underground. In some circumstances buried cables are advantageous, but the usual cost is 5 to 10 times that of overhead circuits.")

23. The Commission did state the underground costs would be prohibitive "except for short distances," but no substantiation of this position was offered nor was a definition of short distance given.

24. Commissioner Ross remarked that "the tactics of [Consolidated Edison] were obviously dictated by the precedential effect of underground transmission." See testimony of senior vice-president Waring. "[T]here are thousands of miles of transmission and distribution lines elsewhere in our territory and in the State of New

At the time of its original hearings, there was sufficient evidence before the Commission concerning the danger to fish to warrant further inquiry. The evidence included a letter from Kenneth Holum, Assistant Secretary of the Department of the Interior, and a statement made for the record by Robert A. Cook, on behalf of the New York State Water Resources Commission in which Mr. Cook said: "[T]he possibility still exists that extensive losses of eggs and/or young of valuable species might occur after installation of the proposed screening devices."

Just after the Commission closed its proceedings in November the hearings held by the New York State Legislative Committee on Natural Resources alerted many fisherman groups to the threat posed by the Storm King project. On December 24 and 30, January 8, and February 3 each of four groups, concerned with fishing, petitioned for the right to intervene and present evidence. They wished to show that the major spawning grounds for the distinct race of Hudson River striped bass was in the immediate vicinity of the Storm King project and not "much farther upstream" as inferred by Dr. Perlmutter, the one expert witness called by Consolidated Edison; to attempt to prove that, contrary to the impression given by Dr. Perlmutter, bass eggs and larvae float in the water, at the mercy of currents; that due to the location of the spawning ground and the Hudson's tidal flow, the eggs and larvae would be directly subject to the influence of the plant and would be threatened with destruction; that "no screening device presently feasible would adequately protect these early stages of fish life"

York, where there is just as much or more reason to put the transmission lines underground as there is here."

This approach is unacceptable. Each case must be judged on its own merits. The area involved here is an area of "*unique beauty*," as Commissioner Ross noted in his dissenting opinion.

and that their loss would ultimately destroy the economically valuable fisheries. Their evidence also indicated that in the case of shad, the young migrate from their spawning grounds, down past Cornwall, and being smaller than the meshes of the contemplated fish screens, would be subject to the hazards already described.[25] The Commission rejected all these petitions as "untimely," and seemingly placing great reliance on the testimony of Dr. Perlmutter, concluded:

> "The project will not adversely affect the fish resources of the Hudson River provided adequate protective facilities are installed."

Although an opportunity was made available at the May hearings for petitioners to submit evidence on protective designs, the question of the adequacy of *any* protective design was inexplicably excluded by the Commission.

Recent events illustrate other deficiencies in the Commission's record. In hearings before the House Subcommittee on Fisheries and Wildlife Studying the Hudson River Spawning Grounds, 89th Cong. 1st Sess., May 10, 11, 1965, Mr. James McBroom, representing the Department of the Interior, stated:

> "Practical screening methods are known which could prevent young-of-the-year striped bass and shad from being caught up in the [Storm King] project's pumps,

25. The Committee concluded:

"The Hudson River is a spawning ground for shad and striped bass. A multi-million dollar fishing industry, both commercial and sport, has been built on this process of nature . . . . The Joint Legislative Committee . . . goes on record as being unalterably opposed to the granting of Con Ed's application, until such time as there is definite, impartial and conclusive proof that the project will not have an adverse effect on the fish life and spawning process upon which the fishing industry depends for its livelihood." *Preliminary Report* 7.

but practical means of protection of eggs and larvae stages have yet to be devised.

Furthermore the location of the proposed plant appears from available evidence to be at or very near the crucial spot as to potential for harm to the overall production of eggs and larvae of the Hudson River striped bass. The cumulative effect of unmitigated loss of eggs and larvae of striped bass by this power project could have a serious effect on the Hudson River striped bass fishery and the dependent fisheries around Long Island and offshore."

Mr. E. L. Cheatum, representing the New York State Conservative Department, gave similar testimony. At the May hearings the testimony of Mr. Walburg and Mr. Wagner, witnesses for the Department of Interior, and Dr. Raney and Mr. Massmann, witnesses for Scenic Hudson, was substantially to the same effect. Indeed, the Commission in its October 4 order acknowledged that the protective device to which it had previously referred favorably (March 9 order) "may not be adequate to provide the protection required" (October 4 order).

On remand, the Commission should take the whole fisheries question into consideration before deciding whether the Storm King project is to be licensed.

The Commission should reexamine all questions on which we have found the record insufficient and all related matters. The Commission's renewed proceedings must include as a basic concern the preservation of natural beauty and of national historic shrines, keeping in mind that, in our affluent society, the cost of a project is only one of several factors to be considered. The record as it comes to us fails markedly to make out a case for the Storm King project on, among other matters, costs, public convenience and necessity, and absence of reasonable alternatives. Of

course, the Commission should make every effort to expedite the new proceedings.

Petitioners' application, pursuant to Federal Power Act § 313(b), 16 U. S. C. § 825*l*(b), to adduce additional evidence concerning alternatives to the Storm King project and the cost and practicality of underground transmission facilities is granted.

The licensing order of March 9 and the two orders of May 6 are set aside, and the case remanded for further proceedings.

ORDER DENYING PETITION FOR REVIEW.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT.

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-second day of October, one thousand nine hundred and seventy-one.

Present: HON. HENRY J. FRIENDLY, *Chief Judge*
HON. PAUL R. HAYS, HON. JAMES L. OAKES,
Circuit Judges.

SCENIC HUDSON PRESERVATION CONFERENCE, PALISADES INTERSTATE PARK COMMISSION, CITY OF NEW YORK, THE SIERRA CLUB AND ITS ATLANTIC CHAPTER, THE WILDERNESS SOCIETY, THE IZAAK WALTON LEAGUE OF AMERICA, NATIONAL AUDUBON SOCIETY AND NATIONAL PARKS AND CONSERVATION ASSOCIATION,

Petitioners.

v.

FEDERAL POWER COMMISSION,

Respondent,

AND

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., TOWN OF CORNWALL AND VILLAGE OF CORNWALL,

Intervenors.

Petitions for review of an order of the Federal Power Commission,

This case came on to be heard on the certificate of record of the Federal Power Commission and was argued by counsel.

On consideration thereof, it is now hereby ordered, adjudged and decreed that the petitions be and they hereby are denied in accordance with the opinion of this court with costs to be taxed against the petitioners.

A. DANIEL FUSARO,
Clerk.

ORDER DENYING REHEARING.

35676-78, 35683 & 35688-9.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT.

SCENIC HUDSON PRESERVATION CONFERENCE, ET AL.,
Petitioners,

v.

FEDERAL POWER COMMISSION,
Respondent.

Petitions for a rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for Scenic Hudson Preservation Conference, the Sierra Club and its Atlantic Chapter, the Izaak Walton League of America, National Audubon Society and National Parks and Conservation Ass'n, The City of New York, and the Wilderness Society, a poll of all the active circuit judges having been taken, and a majority for rehearing in banc not having been obtained, it is ordered that said petition be and it hereby is denied. Judges Hays, Mansfield, Oakes and Timbers voted for en banc consideration.

HENRY J. FRIENDLY,
Chief Judge.

November 26, 1971.

TIMBERS, *Circuit Judge*, dissenting:

I dissent from the denial of reconsideration *en banc*.

Aside from the fact that four of the eight active judges of this Court (including two members of the panel who heard and decided the case originally) have voted in favor of *en banc* reconsideration, it does seem to me that a substantial question of unusual importance is presented by the panel's application of the substantial evidence test in reviewing the FPC's determination that the benefits of the project outweigh the environmental damages.

NEPA CASES.

(a) Cases in which agency action was enjoined because of non-compliance with NEPA: *West Virginia Highlands Conservancy v. Island Creek Coal Co.*, 441 F. 2d 232 (4th Cir. 1971); *San Antonio Conservation Soc'y v. Texas Highway Dept.*, 2 ERC 1872, 1 ELR 20379 (5th Cir. 1971); *Lathan v. Volpe*, 3 ERC 1292 (9th Cir. 1971); *National Helium Corp. v. Morton*, 3 ERC 1129, 1 ELR 20478 (10th Cir.), *aff'g*, 326 F. Supp. 151 (D. Kan. 1971); *Berkson v. Morton*, 3 ERC 1121 (D. Md. 1971); *Environmental Defense Fund, Inc. v. Corps of Engineers*, 325 F. Supp. 749 (E. D. Ark. 1971); *Environmental Defense Fund, Inc. v. Corps of Engineers*, 324 F. Supp. 878 (D. D. C. 1971); *Environmental Defense Fund, Inc. v. Corps of Engineers*, 325 F. Supp. 728 (E. D. Ark. 1971); *Environmental Defense Funds, Inc. v. Corps of Engineers*, 331 F. Supp. 925 (D. D. C. 1971); *Gibson v. Ruckelshaus*, 3 ERC 1028, 1 ELR 20337 (E. D. Tex. 1971); *Goose Hollow Foothills League v. Romney*, 334 F. Supp. 877 (D. Ore. 1971); *Harrisburg Coalition v. Volpe*, 330 F. Supp. 918 (M. D. Pa. 1971); *Izaak Walton League v. Schlesinger*, 3 ERC 1453 (D. D. C. 1971); *Kalur v. Resor*, 335 F. Supp. 1 (D. D. C. 1971); *Morningside-Lenox Park Ass'n. v. Volpe*, 334 F. Supp. 132 (N. D. Ga. 1971); *Nolop v. Volpe*, 3 ERC 1238 (D. S. D. 1971); *NRDC v. Morton*, 3 ERC 1473 (D. D. C. 1971); *Texas Committee v. Resor*, 1 ELR 20496 (W. D. Tex. 1971); *Sierra Club v. Laird*, 1 ELR 20085 (D. Ariz. 1970); *Texas Committee v. United States*, 3 ERC 1303 (W. D. Tex.), *appeal dismissed as moot*, — F. 2d — (5th Cir. 1970); *Wilderness Soc'y v. Hickel*, 325 F. Supp. 422 (D. D. C. 1970).

(b) Cases in which an injunction was denied: *Thermal Ecology v. AEC*, 433 F. 2d 524 (D. C. Cir. 1970); *Thermal*

Ecology v. AEC, 2 ERC 1405 (7th Cir. 1970); *Brooks v. Volpe*, 319 F. Supp. 90 (W. D. Wash. 1970); *Bucklein v. Volpe*, 2 ERC 1082, 1 ELR 20043 (N. D. Cal. 1970); *Arlington Coalition v. Volpe*, 332 F. Supp. 1218 (E. D. Va. 1971); *Citizens to Preserve Foster Park v. Volpe*, 3 ERC 1031, 1 ELR 20389 (N. D. Ind. 1971); *Daly v. Volpe*, 326 F. Supp. 868 (W. D. Wash. 1971); *Dorothy Thomas Found. v. Hardin*, 1 ERC 1679 (W. D. M. C. 1970); *Elliot v. Volpe*, 328 F. Supp. 831 (D. Mass. 1971); *Environmental Defense Fund, Inc. v. Hardin*, 325 F. Supp. 1401 (D. D. C. 1971); *Investment Syndicates, Inc. v. Richmond*, 1 ERC 1713, 1 ELR 20044 (D. Ore. 1970); *Lever Bros. Co. v. FTC*, 325 F. Supp. 371 (D. Me. 1971); *McQueary v. Laird*, 3 ERC 1185 (D. Colo. 1971); *Monroe County Conservation Assn. v. Hansen*, 3 ERC 1208, 1 ELR 20362 (W. D. N. Y. 1971); *Pennsylvania Environmental Council v. Bartlett*, 315 F. Supp. 238 (M. D. Pa. 1970), *aff'd*, 3 ERC 1421 (3rd Cir. 1971); *Sierra Club v. Hardin*, 325 F. Supp. 99 (D. Alaska 1971); *State Comm. to Stop Sanquine v. Laird*, 317 F. Supp. 665 (W. D. Wis. 1970)..

(c) Miscellaneous NEPA cases: *Ely v. Velde*, 451 F. 2d 1130 (4th Cir.), *rev'g* 321 F. Supp. 1088 (E. D. Va. 1971); *Upper Pecos Ass'n. v. Stans*, 452 F. 2d 1233 (10th Cir.), *aff'g* 328 F. Supp. 332 (D. N. M. 1971); *Zabel v. Tabb*, 430 F. 2d 199 (5th Cir. 1970), *cert. denied*, 39 U. S. L. W. 3360 (1971); *Businessmen for the Public Interest v. Resor*, 3 ERC 1216 (N. D. Ill. 1971); *Echo Park Residents Comm. v. Romney*, 3 ERC 1255 (C. D. Cal. 1971); *Delaware v. Pennsylvania N. Y. Central Transp. Co.*, 2 ERC 1355, 1 ELR 20106 (D. Del. 1971); *Izaak Walton League v. Macchia*, 2 ERC 1661 (C. N. J. 1971); *Izaak Walton League v. St. Clair*, 313 F. Supp. 1312 (D. Minn. 1970); *Lloyd Harbor Study Group, Inc. v. Seaborg*, 2 ERC 1380, 1 ELR

20188 (E. D. N. Y. 1971); *Northwest Area WRO v. Volpe*, 2 ERC 1704, 1 ELR 20186 (E. D. Wash. 1970); *NRDC v. TVA*, 3 ERC 1468 (S. D. N. Y. 1971); *United States v. Brookhaven*, 2 ERC 1761, 1 ELR 20377 (E. D. N. Y. 1971); *United States v. Moretti, Inc.*, 331 F. Supp. 151 (S. D. Fla. 1971); *United States v. 247.37 Acres*, 3 ERC 1099 (S. D. Ohio 1971).

No. 71-1219

Separate appendix to petition
NOT PRINTED.

IN THE

Supreme Court of the United States

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No. 71-1219

SCENIC HUDSON PRESERVATION CONFERENCE, *et al.*,
Petitioners,

—v.—

FEDERAL POWER COMMISSION,
CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., *et al.*,
Respondents.

No. 71-1220

THE CITY OF NEW YORK,
Petitioner,

—v.—

FEDERAL POWER COMMISSION,
CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., *et al.*,
Respondents.

No. 71-1221

THE SIERRA CLUB AND ITS ATLANTIC CHAPTER,
Petitioners,

—v.—

FEDERAL POWER COMMISSION,
CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., *et al.*,
Respondents.

BRIEF OF CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., IN OPPOSITION TO PETITIONS FOR A WRIT OF CERTIORARI

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Dated: April 25, 1972